Native Title Hot Spots

No.16, October 2005

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Determination of native title—five more in Torres Strait

Billy v Queensland [2005] FCA 1115; *Thaiday v Queensland* [2005] FCA 1116; *Warria v Queensland* [2005] FCA 1117; *Nona v Queensland* [2005] FCA 1118

Black CJ, 15 August 2005

Issue

All these cases deal with determinations under the *Native Title Act 1993* (Cwlth) (NTA) recognising native title to various islands in the Torres Strait.

Power of the court—s. 87

The parties sought consent determinations recognising native title. In all cases, his Honour Chief Justice Black found that:

- the discretion to make a consent determination found in s. 87(1) must be exercised judicially;
- both the matters to be taken into account in the exercise of the discretion and the weight to be given to those matters may vary according to the particular circumstances of each case;
- in these cases, the 'technical' preconditions had been complied with and it was 'appropriate' to make the orders;
- it was clear that the parties had independent and competent legal advice and that the agreements were freely entered into;
- the proposed orders were unambiguous and appropriate in the circumstances—see, for example *Billy v Queensland* [2005] FCA 1115 at [7] to [9].

The evidence in each case included an affidavit of one of the native title claim group and an anthropological report from consultant anthropologists with extensive experience in the Torres Strait region.

Maintenance of traditional law and traditional custom

In all cases, the claimants were settled on nearby islands. However, the evidence indicated they had maintained a continuous 'physical, cultural and spiritual connection' with the determination area by:

- maintaining regular, uninterrupted visits to the islands for camping, hunting, fishing, foraging and gardening in accordance with traditional law and custom;
- regarding the islands as being of spiritual significance;
- transmitting rights and interests in the islands according to traditional law and custom;
- asserting a right to grant and withhold permission to visit;
- using and sharing the resources of the determination area in traditional ways—at [11] to [14], [10] and [11], [10] to [13], [11] to [13] respectively.

This was proof of a normative system which:

- has force on the peoples' lives;

- regulates their access to, and use of, the islands; and
- has been in existence since before the assertion of sovereignty.

In several cases, this was accepted to be a shared system between different peoples.

Determination areas

In all cases, the native title rights and interests recognised were confined to the area landward of the 'high water mark' as defined in the *Land Act 1994* (Qld).

Rights and interests recognised

Subject both to certain qualifications and the other rights and interests in the area, native title was recognised as a right to possession, occupation, use and enjoyment of the determination areas to the exclusion of all others. Black CJ emphasised that 'the order does not grant native title…it recognises what they have long held'—at [17], [14], [16] and [16] respectively.

Note that the native title in relation to 'water' was found to be a non-exclusive right to:

- hunt and fish in, or on, and gather from, the 'water' for the purpose of satisfying personal, domestic or non-commercial communal needs; and
- take, use and enjoy the 'water' for the purpose of satisfying personal, domestic or non-commercial communal needs.

Appeal decision—Murchison Davenport

Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135

29 July 2005, Wilcox, French and Weinberg JJ

Issues

The main issues before the Full Court of the Federal Court in these appeal proceedings were:

- the nature and composition of the native title holding group;
- the recognition of particular native title rights and interests;
- the application of s. 47B of the *Native Title Act 1993* (Cwlth) (NTA); and
- other matters relating to the form of the determination.

The court delivered a joint judgment in this case. None of the arguments raised in the appeal by the Northern Territory Government on the first point succeeded.

Background

This case deals with an appeal and cross-appeal against aspects of his Honour Justice Mansfield's determination of native title in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* [2004] FCA 472 (summarised in *Native Title Hot Spots* Issue 10). Mansfield J determined that the common law holders were the Aboriginal persons who are:

- members of one or more of seven landholding or estate groups (landholding groups), each associated via descent with a particular part of the determination area;
- those people recognised by the landholding groups as members because of non-descent based connections, including adoption or birthplace affiliation; and
- spouses of persons referred to in the preceding categories who are recognised by the landholding groups as having native title rights and interests in the determination area.

Tenure

The determination area covered Northern Territory portions 4386 and 4387 and an area where a townsite was proclaimed in 1953 but never developed. The remainder of the determination area was subject to a perpetual lease to the Land Conservation Corporation of the Northern Territory (the corporation) to

manage the area with the intention of creating the Davenport Ranges National Park. The entire determination area had, at some point in time, been subject to the grant of pastoral leases but none were current when the determination was made.

Appeal and cross-appeal

The territory raised more than 50 grounds of appeal which fell into the four broad areas noted above. The cross-appeal filed by the applicants sought to vary some aspects of the determination. Some variations were agreed and others were allowed by the court. Others that were 'stylistic' were not allowed as 'it is no part of the function of an appeal court to improve on the style of the trial judge. There must be some appealable error'—at [217].

The remainder of this summary deals only with the appeal.

Native title law in Australia

Before addressing the grounds of appeal, their Honours gave a useful summary of the 'developing law of native title'—see [61] to [93]. Some points of interest are noted below.

Recognition under the NTA

In reviewing the law on native title in Australia, the court made the following comments about 'recognition' under the NTA:

> Recognition is not a process which has any transforming effect upon traditional laws and customs or the rights and interests to which, in their own terms, they give rise. The term 'extinguishment' merely refers to the withholding or withdrawal of recognition of native title rights and interests where the exercise of non-indigenous sovereignty is reflected in legislative or executive acts inconsistent with such recognition—at [64].

It was also held that enforceability may be a condition of common law recognition:

> [T]here is a real question whether common law recognition has any role to play in relation to a right or interest which is incapable of enforcement….[S]ymbolic statements which are empty of content have no place in a determination of rights—at [168].

Communal character of native title

In considering ss. 223 and 225, the court commented that:

> These aspects of the definition of native title rights and interests have their origin in the majority judgment in *Mabo (No 2) [Mabo v Queensland (No 2)* (1992) 175 CLR 1] and could not have been intended to undercut the fundamental principle of the communal character of native title—at [71].

Meaning of 'society' is non-technical

In relation to the concept of a 'society' in existence since sovereignty as the repository of traditional laws and customs, a notion derived from *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (summarised in *Native Title Hot Spots* Issue 3), it was said that:

> The relevant ordinary meaning of society is 'a body of people forming a community or living under the same government'…It is not a word which appears in the NT Act…It does not introduce…technical, jurisprudential or social scientific criteria for the classification…of people as 'societies'…
>
> The determinations which may be made under s 225 cover a range of possibilities which depend upon the nature of the society…In some cases the members of the community identified as the relevant society may enjoy communal ownership of the native title rights and interests, albeit they are allocated intramurally to particular families and clans…
>
> If, on the other hand, the society identified…is a cultural bloc whose members are dispersed in groups over a large arid or semi-arid area an inference of communal ownership of native title…derived from its laws and customs may be difficult if not impossible to draw [and in an appropriate case]…a native title determination could be made in favour of individuals or small groups who held native title rights under the traditional laws and customs of a society or

community of which they are part [e.g. the Western Desert Bloc]…Each case will…depend upon its own facts—at [78] to [80].

The court then gave a useful summary of earlier cases in this context, noting (among other things) the relevance of the finding in *Western Australia v Ward* (2000) 99 FCR 316 that:

> [A] composite community of estate holding groups may comprise a community which enjoys communal ownership of the native title rights and interests albeit there may be intramural allocations between particular family or clan groups or other sub-sets of the community—at [81].

Mabo (No 2)—extrinsic aid to interpretation of 'connection'

It was noted that the 'connection' requirement in s. 223(1)(b) operates in two ways:

- it declares, as a condition of the existence of native title under the NTA, that the putative holders have 'a connection with the land or waters'; and
- it requires that the connection be 'by' the traditional laws and customs under which the claimed rights and interests are possessed—at [87].

The drafting of s. 223(1)(b) was said to be 'opaque' because the word 'connection' comes from the judgment of Brennan J in *Mabo (No 2)* at 59 but appears to have been applied in the NTA 'somewhat out of context'—at [87], contrast to *De Rose v South Australia (No 2)* [2005] FCAFC 110 at [30], summarised in *Native Title Hots Spots* Issue 15, where a differently constituted Full Court said: 'What was said in *Mabo (No 2)* cannot control the interpretation of s 223(1), although it may be taken into account'.

Having considered what Brennan J said in *Mabo (No 2)* as an extrinsic aid to interpreting the provision, their Honours noted that:

> It may be that not enough emphasis has been placed on the idea of continuity of observance as a manifestation of connection...The use of 'connection' as emphasising a requirement to show continuity of association with the land by observance and acknowledgment of traditional law and custom relating to it gives proper recognition to its origins in the *Mabo* judgment. It involves the continuing assertion by the group of its traditional relationship to the country defined by its laws and customs—at [92].

The territory submitted that the 'connection' required by s. 223(1)(b) could only be made out at the estate group level as a reflection of the identified native title rights and interests. Their Honours found that this was a restrictive view of connection:

> The concept…involves the relationship of the relevant community to its country defined by laws and customs which it acknowledges and observes. The relationship may be expressed in various ways including, but not limited to, physical presence on the land. It does not depend upon the precise locus, within a community, of native title rights and interests intramurally allocated, provided that they can be regarded as held by the community as a whole—at [111].

Limits on native title rights and interests

It was said that:

> The word 'connection' should not be taken as qualifying or limiting the range of rights and interests arising under traditional law and custom which are native title rights and interests for the purposes of the NT Act.…Their content is limited by the requirement that they be rights and interests 'in relation to land or waters'. The words 'in relation to' are words of wide import. The content of native title rights and interests may also be limited by the requirement, imposed by s 223(1)(c) that they 'are recognised by the common law of native title'—at [92] and [93].

Native title holders—one community or seven estate groups?

The territory argued that:

- the claim group was a recent composite of four language and tribal groups that were not connected to the claim area in accordance with traditional laws and custom;
- Mansfield J had failed to make any express findings about the community at the time of the assertion of sovereignty;
- a 'proper' determination would have reflected the evidence that members of each of the seven landholding groups had rights and interests in their own estate or country under traditional laws and customs and a connection with that country by those laws and customs;
- the evidence supported native title rights and interests being held severally by the seven landholding groups and the rights and interests associated with those groups could not be viewed as an intramural allocation of native title rights and interests held communally by the entire claim group.

Mansfield J had found that:

- the claim group constituted an identifiable community that lives under a common set of laws and customs and has its 'ancestral source' in the community occupying the claim area at the time of sovereignty;
- the evidence demonstrated the existence of 'a wider communal title than one on an estate group basis at that earlier period';
- there are different subgroups or persons who have a particular responsibility for particular areas but there was also a significant crossing or sharing of such responsibilities across particular persons from different estate subgroups which arises under the broader communal laws and customs;
- the claim group could collectively assert against non-members the right to enforce its native title rights and interests.

The court held that:

> The reasoning and findings in the judgment under appeal reflected a mode of analysis of the evidence consistent with that explained in *Yorta Yorta*…There was no error in the reasoning leading to the determination of communal rights. His Honour was correct to treat the relevant title as communal over the whole area rather than as severally held by the estate groups in respect of their particular estates—at [112].

Birthplace, adoption and non-descent connection

The territory's next point related to the class of persons recognised by members of the seven landholding groups 'by virtue of non-descent based connections, including adoption or birthplace affiliation', arguing that this:

- amounted to the determination of a native title right to enforce traditional laws and customs that was not a right with relation to land and waters; and
- gave effect to traditional laws and customs as a system of law operating concurrently with non-indigenous law.

The court rejected these submissions:

> The interpretation and application of laws and customs by which membership is defined, even if not expressly incorporating a requirement for 'recognition' by members of the relevant society, is likely to involve some process of interpretation and consequential acceptance or non-acceptance of individual membership. The Northern Territory's submissions would require the Court to descend to the fine detail of possible applications of traditional law or custom to a range of cases of non-descent based connection where an issue of recognition of membership may arise—at [114].

The applicants accepted that the words 'non-descent based connections, *including* adoption or birthplace affiliation' was somewhat uncertain and that this aspect of the determination should read 'non-descent

based connections, *being* adoption or birthplace affiliation'. Subject to that amendment, the court rejected the territory's submissions, noting that the determination involved:

> [A]n acceptance that the community of native title holders is a living society. It is not consistent with the purposes of the NT Act, nor productive of any practical benefit to require that the laws and customs of indigenous society and the rights and interests arising under them be presented as some kind of organism in amber whose microanatomy is available for convenient inspection by non-indigenous authorities—at [116].

Connection and spousal affiliation

The territory argued that any rights and interests spouses had could not be native title rights and interests unless they had a 'connection' with the country. The court found that, in cases where the rights and interests are held communally, the relevant connection is that between the community as a whole and the land and waters the subject of the claim:

> Although it might be said that spousal connection to the community does not bring with it a connection between the spouse and the land, that is not the connection that is relevant in this case—at [117].

'Incidental' activities

The territory criticised part of the proposed determination recognising 'the right to conduct activities incidental to' the native title rights and interests. The court:

- found it was plain that each native title right and interest recognised in the determination included a right to conduct activities necessary to give effect to it;
- varied the determination for clarity to read: 'including the right to conduct activities necessary to give effect to them'—at [119].

Right to live and erect structures on land formerly subject to pastoral lease

The territory argued that the right to live and erect structures embraced a right to live permanently on the area, which was inconsistent with the rights created by the grant of the historical pastoral leases and, to the extent of that inconsistency, extinguished. Most of the leases contained reservations in favour of Aboriginal people and all were previous non-exclusive possession acts attributable to the territory under the *Validation (Native Title) Act 1999* (NT).

Mansfield J had found that the reservation 'preserved' rights to erect shelters and live on the land. The 'underlying issue' was the scope of the inconsistency between the historic pastoral leaseholders' rights and the determined native title rights and interests—at [123] to [129].

The court considered the authorities and noted that:

- the content of the reservations was incidental and did not define the limits of native title rights and interests but may be taken into account in determining the scope of the pastoral leaseholder's rights;
- the relevant extinguishment of native title rights and interests derives only from an inconsistency with rights historically conferred by the lease; and
- no prospective pastoral activity would arise—at [129] and [131].

It was held that:

> [T]he right to 'live' on the land can be interpreted as a right to live permanently on the land without any conflict with pastoral leaseholders' rights. That right does not necessarily involve permanent settlement at a particular place. The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so. Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The

existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise—at [131], referring to *Daniel v Western Australia* (No 2) [2003] FCA 1425 and *Neowarra v Western Australia* [2003] FCA 1402, summarised in *Native Title Hot Spots* Issue 8 and Issue 9 respectively.

The court held that the right recognised by Mansfield J should stand.

Is the right to teach a right 'in relation to land and waters' as required under s. 223(1)?

The territory argued that the right to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters was not a right in relation to land and waters, as required by the chapeau to s. 223(1). Rather, it was akin to the right to maintain and protect spiritual knowledge rejected by the High Court in *Western Australia v Ward* (2002) 213 CLR 1 (summarised in *Native Title Hot Spots* Issue 1).

The court found it was a right in relation to land and waters if specified as a right to teach on the land that requires access to, and use of, the land for that purpose—at [134].

A reformulation in the following terms was substituted to clarify the position:

> The right to do the following activities on the land…teach the physical and spiritual attributes of places and areas of importance on or in the land and waters.

Is the right to trade traditional resources a right 'in relation to land and waters'?

The court held that:

- the right to trade is a right relating to the resources of the land and it was difficult to see on what basis it would not be a right in relation to land (see also *Commonwealth v Yarmirr* (1999) 101 FCR 171 at [250] on this point);
- however, there was no evidence to support the right to trade in this case. Therefore, the determination was amended to delete reference to trade so that the right recognised is now: 'the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters'—at [157].

Right to protect sites of importance does not imply right to control

The territory submitted that:

- the right to protect sites necessarily involves a right to control access;
- historical grants of non-exclusive pastoral leases had extinguished any such right.

The court found that there was no error by the trial judge on this point, noting that:

- the determination expressly stated that the native title rights and interests were not to be exclusive (other than in relation to the townsite area, where s. 47B applied, discussed below); and
- the notion of protection of sites may involve physical activities on the site to prevent its destruction and also extends to control of ceremonial activities but need not be read as implying a general right to control of access—at [140], citing *Attorney-General (Northern Territory) v Ward* (2003) 134 FCR 16 at [25], summarised in *Native Title Hot Spots* Issue 8 and compare with Mansfield J in *Gawirrin Gumana v Northern Territory* (No 2) [2005] FCA 1425 at [60] to [62], summarised in this issue of *Native Title Hot Spots.*

Right to make decisions about access and use

The question on appeal was whether the partial extinguishment by the grant of historical non-exclusive pastoral leases left in place a qualified native title right to exclude persons (other than the relevant pastoralists, their invitees or other statutory entrants) and, in particular, other Aboriginal people.

The court held that:

- the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world;
- the underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty;
- the rights set out in the determination did not resemble the holistic right of exclusion which went with exclusive possession and occupation at the time of sovereignty—at [148].

The applicants proposed an alternative in the following terms:

> As an incident of their rights in relation to the use and enjoyment of the land and waters, a right to take appropriate steps according to law to prevent or mitigate any activity or presence of persons on the land which—
>
> - is without or in excess of lawful authority; and
> - interferes with or impairs the use and enjoyment of the land in accordance with rights and interests identified above.

This formulation was also rejected by the court because:

- it imported a right of exclusion;
- it was very difficult to interpret and apply the formulation to support a right to exclude a person from the land in the circumstances it defined—at [150].

The appeal on this point was allowed and the paragraphs in the determination where a residual right to control access was recognised were deleted, except over the townsite, where prior extinguishment must be disregarded because s. 47B applies—at [148] and see below on s. 47B.

Right to make decisions about use and enjoyment by Aboriginal people

The right to make decisions about the use and enjoyment of the determination area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders was 'not without difficulty' because:

> There is a risk that it may be seen as creating a criterion for exclusion based in part upon Aboriginality. In any event it does not appear…that there are persons other than the native title holders who are bound by their traditional laws and customs. The position would be different were the native title holders a subset of a wider society incorporating other groups bound by the same traditional laws and customs…To the extent that the native title holders could collectively exclude particular members from particular areas, such as women from law grounds, that is a matter best left to the intramural workings of the traditional laws and customs. It is not a matter requiring determination as a distinct native title right—at [151], compare with Mansfield J in *Gawirrin Gumana v Northern Territory (No 2)* [2005] FCA 1425 at [74], summarised in this issue of *Native Title Hot Spots.*

Right to control disclosure of spiritual beliefs and practices not 'in relation to land or waters'

The determination made by Mansfield J included:

> The right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters.

His Honour found this was site specific and concerned with controlling the acquisition of

the knowledge, not the use of it, in accordance with traditional laws and customs. The territory appealed against this finding.

On appeal, the court found that the right recognised in the determination was 'not a right in relation to land'. Reformulating it to read: 'the right to such control of access to places on the land and waters as will prevent the disclosure of spiritual beliefs etc.' was found to be equally problematic as it purported to confer 'a right to exclude persons from entry on to the land' in circumstances where any right of that kind had been extinguished by the grant of the historical non-exclusive pastoral lease. Therefore, this part to Mansfield J's determination was deleted—at [162] to [164].

Right to determine membership of landholding group

The applicants accepted that this was more properly recognised as part of their traditional laws and customs rather than as a native title right. Therefore, it was deleted from the determination—at [165].

Right to be acknowledged as the Aboriginal owners of land

The court found that this right should not be included in the determination of native title because it 'is incapable of precise definition and incapable of enforcement'—at [166] to [168].

Application of s. 47B

If s. 47B applies to an area, then all extinguishment brought about by the 'creation of any prior interest…must be disregarded' for all purposes under the NTA. However, there are three conditions that must be fulfilled to attract this provision:

- the area concerned must be subject to a claimant application;
- it must not be either:
  - 'covered' by any of a number of interests (e.g. reservation or proclamation) 'made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose'; or
  - subject to a 'resumption process' as defined in s. 47B(5)(b); and
- one or more of the members of the native title claim group must 'occupy' the area when the claimant application is made.

The territory appealed against the finding that s. 47B applied to the township area on two grounds:

- the township area was not occupied by one or more members of the claim group at the time the application was made; and
- s. 47B did not apply because the area was 'covered by' the township proclamation—see s. 47B(1)(b)(ii).

The proclamation in question was made over Hatches Creek in 1953 pursuant to s. 111 of the *Crown Lands Ordinance 1931–1952* (NT) (CLO), continued in force by operation of s. 108(2) of the *Crown Lands Act 1992* (NT). In it, the Governor General declared that:

> [A]ll that portion of Crown land described in the Schedule…shall…be constituted a new town…and…the boundaries of the…new town shall be as defined…[A]ll Crown land within the…town shall be set apart as town lands.

Proclamation for a particular purpose or public purposes

The court considered the terms of s. 111 of the CLO and found:

- the proclamation of a township had no operative legal effect beyond providing satisfaction of a condition precedent for the grant of the various kinds of leases contemplated by the ordinance;
- while the proclamation made over the Hatches Creek Townsite was a 'proclamation' within the meaning of s. 47B(1)(b)(ii), to be excluded from s. 47B, it

must also be a proclamation 'under which the whole or a part of the land...in the area is to be used for public purposes or a particular purpose';

- any qualification on the application of s. 47B was intended to minimise the impact of a determination that native title exists on areas set aside for public or particular purposes and, as it is a beneficial provision, that limitation should not be construed more widely than is necessary to achieve its purpose;

- a proclamation for a broadly expressed purpose encompassing a variety of potential but unascertained uses was not a proclamation for a particular purpose;

- the term 'public purposes' might cover a land use planning purpose met by establishing a framework for the allocation of private rights, like residential leases, or refer to purposes of a public nature, like the creation of reserves for recreation;

- a narrower construction accords with a comprehensible policy that, in the public interest, prior extinguishment which might prevent public exposure to compensation claims or future act processes should be continued in force—at [178] and [185] to [187].

It was found that, while it was not necessary in aid of the narrower construction to define its outer limits here:

> [T]he mere proclamation of a townsite, which might comprise largely private property holdings by lease or otherwise, does not define public purposes or a particular purpose within the meaning of s 47B(1)(b)(ii)—at [187].

Meaning of 'is to be used'

The proclamation must be one under which the land or waters which it covers 'is to be used' for the specified purposes if s. 47B is to be excluded. The court noted that:

- 'is to be used' imports the need to identify some intention to use the area for the requisite purpose or purposes;

- the relevant intention must be 'fixed for the duration of the proclamation' and ascertained 'objectively' by examining the terms of the proclamation and the relevant legislation;

- while there was evidence of a public plan dated 1977 showing recreation area, government offices, tennis courts, a school site and, apparently, residential lots and roads, it had no statutory significance or legal effect and so it did not impact upon the characterisation of the proclamation for the purposes of s. 47B;

- the evidence suggested that there is little or no prospect of the Hatches Creek townsite ever becoming a town, i.e. the proclamation is a 'dead letter'—at [188] to [189].

Finding on s. 47B(1)(b)(ii)

On the basis that the proclamation in this case was not to be used for 'public purposes' or for a 'particular purpose', it was held that the 'proclamation' was not of a kind that would exclude the area from the application of s. 47B. This left the challenge to the finding on 'occupation'.

Occupation—s. 47B(1)(c)

It was submitted that:

- the court should act only on direct evidence of the occupation, not upon inference, because s. 47B has a significant effect; and

- in any case, the evidence referred to by Mansfield J was insufficient to support any such inference, i.e. that the claim group hunted and traversed the town area at the time the application was made.

Both submissions were rejected, with the court:

- noting there was nothing about s. 47B that required a more restrictive approach to the discharge of its function;

- finding that it was not disputed that the Hatches Creek town site was part of the applicants' traditional country or that there were native title rights or interests subsisting in it;

- given that background and the evidence of activity in its vicinity, Mansfield J did not err in concluding that the claimants occupied it in the broad sense relevant to s. 47B—[196].

Decision on appeal against application of s. 47B

Given the matters set out above, the appeal against the finding that s. 47B applied was unsuccessful. Therefore, any extinguishment in the Hatches Creek township brought about by the creation of a prior interest must be disregarded for all purposes under the NTA.

Effect of the grant of CLP 1117 to the Land Conservation Corporation

Mansfield J had found that CLP 1117 was category D past act which conferred a right of exclusive possession subject to the reservations expressed in s. 122, which provided that nothing in the *Territory Parks and Wildlife Conservation Act* (NT) (TPWC Act) limited Aborigines who have traditionally used an area from continuing to use the area in accordance with Aboriginal traditions for non-commercial hunting, gathering and ceremonial purposes. The territory sought to vary the determination (although this was not a ground of appeal) in relation to the area covered CPL 1117 on the basis that it conferred a right of exclusive possession and was, therefore, wholly inconsistent with native title—at [218] to [219].

The court referred to the inconclusive findings on the operation of the non-extinguishment principle (see s. 238) in the joint judgment in *Ward*, agreeing with the applicants that, had the conferral of a right of exclusive possession been a relevant consideration for the purpose of s. 238, the High Court could have reached the conclusion that the grants were wholly inconsistent with any subsisting native title rights and interests. Their Honours went on:

> While it is not disputed that CLP 1117 confers a right of exclusive possession… the stated purpose of the lease is 'Conservation Land Corporation purposes [and the terms and conditions of the lease state that]…the lessee will not use the lease for a purpose other than the purpose for which it is leased.'…The purpose of the lease is plainly related to the conservation and protection of the natural environment. It is not necessarily inconsistent with the [non-exclusive] native title rights which remain in…the determination area—at [226].

Therefore, the amendment proposed by the territory was refused.

Conclusion and costs

The appeal was allowed in part by varying or deleting the native title rights and interests set out in paragraph 3 of the determination. Other than that, the appeal and cross-appeal were dismissed. Given these mixed results, the court was of the view that it was not appropriate to make any order other than that the parties bear their own costs but gave the parties the opportunity to make written submissions on point—at [230] to [231].

Communal or group claim—interim Rubibi decision

Rubibi Community (No 5) v Western Australia [2005] FCA 1025

Merkel J, 29 July 2005

Issue

The main issue in this case, which deals with three claimant applications in the West Kimberley region of Western Australia, was whether the native title claimed was 'communal' or 'group' native title, i.e. 'community' or 'clan' based. It was found to be community-based.

Interim decision

This is what the court called an 'interim decision'. The reasons for His Honour Justice Merkel taking this step after the matter was fully heard were:

- the parties thought a 'mediated compromise' could be reached after the hearing finished;

- the court was prepared to refer the matter to mediation but to 'resolve a significant number of issues relating to the existence and nature of any native title' to the area concerned, an 'interim decision' would be delivered;

- the general consensus of the parties was that this would help limit, and perhaps resolve, the remaining issues by agreement in mediation, which relate to proof of the particular native title rights and interests claimed, including questions of extinguishment—at [12] to [13].

Postscript on mediation

As at the date of publication, no further dates were set for further mediation and the matter had been referred back to Merkel J.

Background

The competing, overlapping claimant applications dealt with here were made by the Yawuru community (the Yawuru claim) on a community basis, and the Walman Yawuru clan (the Walman Yawuru claims) who claimed on a clan basis. The state also argued in favour of clan or estate-based native title.

Initially, those bringing the Walman Yawuru claim were respondents to the Yawuru claim: see *Rubibi Community v Western Australia (No. 3)* (2002) 120 FCR 512 at [18], summarised in *Native Title Hot Spots* Issue 1. However, they subsequently filed two claimant applications, including one claiming 'traditional custodianship' of the land and waters of the Minyirr clan. According to the second Walman Yawuru application, the Minyirr people were the western neighbours of the Walman Yawuru clan but had 'died out' and so the area passed to the Walman Yawuru clan as custodians in accordance with traditional law and custom. Both of the Walman Yawuru applications covered areas that were wholly within the area covered by the Yawuru application.

In an earlier determination over a reserve that was not affected by either of the Walman Yawuru claims, Merkel J determined that the Yawuru community had native title to the reserve, a ceremonial area known as Kunin: see *Rubibi Community v Western Australia* (2001) 112 FCR 409 *(Rubibi).* Some of the evidence given in that hearing was adopted in this matter.

Merkel J noted that the competing claims to the communal title or group (i.e. clan) based native title were incompatible and that if the court concluded the Yawuru claimants' native title was communal native title, the Walman Yawuru claim for group native title must be refused—at [8] to [9].

Some legal principles

Merkel J considered s. 223(1)(a) and (b) of *Native Title Act 1993* (Cwlth) (NTA) and the case law on point, identifying, among others, the following principles:

- native title rights and interests must find their origin in a body of norms or a normative system that existed at sovereignty over the claim areas in 1829;

- the fact of significant alterations to traditional laws and customs does not prevent them from giving rise to native title rights and interests provided they are possessed under presently acknowledged laws and presently observed customs that can still be characterised as 'traditional' and some 'interruption' in exercise of rights and interests is not necessarily fatal to a native title claim;

- the community or group claiming native title must show it has acknowledged and observed those traditional laws and traditional customs that recognise them as possessing rights and interests in relation to the claimed land and waters;

- the 'connection' required under s. 223(1)(b) may be spiritual, cultural or social;

- there is nothing in the NTA that incorporates a requirement of a biological link between the claimants and the holders of native title at sovereignty;

- the relationship between Indigenous societies and their land and waters is holistic in character—at [17] to [24] and [29].

Merkel J noted (among other things) that, in this case:

- the evidence clearly established that the traditional laws and customs relied upon by the Walman Yawuru claimants were the traditional laws and customs of the Yawuru community and that the traditional laws and customs observed by any of the clans of that community were 'entirely derivative and are indistinguishable from' the traditional laws and customs of the Yawuru community;

- the critical question was whether, under the traditional laws and customs of the Yawuru community, either that community or the Walman Yawuru clan group possessed the native title rights and interests claimed;

- the question of whether native title is community or clan-based could not be answered without considering all of the laws and customs relied upon to establish native title;

- the evidence established that there were few, if any, traditional laws and customs that had no direct or indirect connection with the native title rights and interests asserted—at [18] to [19], [25] and [30].

His Honour noted that:

> In order to apply the above [legal] principles, which can now be taken to be well established, it will be necessary to consider the laws and customs relied upon to establish the native title rights and interests claimed, to determine whether they are traditional laws and customs that have normative content and, if so, to determine whether the native title rights and interests possessed under those laws and customs are possessed by the Yawuru community or by any of the clans constituting the Yawuru community. Thus, although the particular question for decision at this stage relates to the seemingly discrete issue of whether native title in the respective claim areas is clan or community based, that question cannot be answered without consideration being given to all of the laws and customs relied upon to establish that title—at [30].

Oral evidence—general

Merkel J made introductory observations about the reliability of oral histories and the contrasting views of various courts and anthropologists noting (among others) the comment in the joint judgment in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 *(Yorta Yorta)* that it is an 'impermissible premise that written evidence about a subject is inherently more reliable than oral history on the same subject'—at [36] to [39].

Yawuru evidence

Evidence was given by several law men and women and others of the Yawuru community and by five law men from surrounding tribes: Karajarri, Mangala, Nyangumarta, Nygina and Bardi—at [47].

His Honour found that the evidence confirmed that:

- both the Yawuru community and the Walman Yawuru clan shared a common element in that the *Bugarrigarra* (or *Buggarri* as called by the Walman Yawuru) is the core of their cultural and spiritual existence and the source of their traditional laws and customs;

- two traditions of law, which were kept separate, were said to apply to Yawuru country:
  - southern law practised by Yawuru, Karajarri, Mangala, Nyangumarta and Nygina peoples referred to as Yawuru law; and

- northern law practised by the Bardi, Nyul Nyul, Jabirr Jabirr and Nyambal peoples referred to as Bardi law;

- there were common customs and laws but the two mytho-ritual traditions differ in their origins from mythical creatures;

- ultimately, the normative system relied upon by the Yawuru was the southern tradition—at [50] to [52] and [54] to [61].

The evidence allowed Merkel J to find (among other things) that:

- on balance, the evidence supported the southern tradition of law as still acknowledged and observed by the Yawuru community and was accepted as 'governing all aspects of life';

- evidence as to *rai* as a totemic connection between Yawuru persons and their *rai* place could be accepted;

- although there are few speakers of Yawuru language today, it is still acknowledged and respected as an important traditional link with the past and an effort to teach the present generation was evidence of that acknowledgement;

- skin group, kinship, *malinyanu* laws and customs still have an important role in the Yawuru community, although it is significantly diminished, particularly in regard to marriage;

- songs, dances and ceremonies are no longer a significant part of the daily existence of the Yawuru community but a link with tradition is maintained by stories that people believe link the Yawuru community with the *Bugarrigarra* and remain an important element of Yawuru life;

- the spiritual association with hunting and use of bush tucker has been diminished yet there remains a link between those activities and the *Bugarrigarra;*

- the community was committed to protecting and looking after country and acknowledged the right to speak for country under traditional law and custom;

- the evidence on *nyiyarbi* or increase sites established there was knowledge and recognition of such sites but there was little current practice of rituals related to those sites;

- traditionally, strangers were required to ask permission to access the country and a modern variation remains sourced in that traditional requirement;

- community membership is established by reference to traditional law and custom rather than solely by descent;

- there should be no departure from the findings on genealogies in *Rubibi No 1* that the Yawuru claimants are likely to be descendents of Yawuru people at the time sovereignty was asserted and are not a new community—at [77] to [79], [80] to [90], [96] to [109], [122], [136] to [153], [159], [162] to [163], [173], [178], [180] to [181] and see also [282] to [291].

Walman Yawuru evidence

The witnesses for the Walman Yawuru clan were all descendants of Ngobing Babere and Chimbere Sitocay. Merkel J noted that:

- Emma Nobing (also called Mimi), a senior law woman who married a non-Aboriginal in 1898, was the primary sources of the Walman Yawuru witnesses' evidence;

- the evidence supported the existence of racist policies in Broome that made it difficult for Mimi and her family to practise Aboriginal law and custom;

- the Walman Yawuru clan witnesses were unable to provide detail of the traditional laws and customs of the clan—at [191], [194], [206], [245] to [246].

By way of contrast, his Honour found:

> While a similar criticism might be made of some of the evidence given by the Yawuru claimants'

witnesses, a significant distinction that can be drawn is that the Yawuru claimants' witnesses and, in particular, the senior Yawuru 'law men' explained the detail of the important spiritual underpinning of the traditional laws and customs as laid down in the southern tradition. The Yawuru claimants' witnesses also included senior 'law men' who were also able to provide much greater detail of the traditional laws and customs that they were acknowledging and observing—at [183].

There were difficulties in the evidence where Walman Yawuru witnesses identified themselves as a Yawuru people living on Yawuru country—at [201] and see also [209], [211], [217], [222] and [244].

On the evidence for the Walman Yawuru clan, Merkel J found:

- site specific evidence justified a finding of a special attachment of the Walman Yawuru witnesses to the *Mangalagun* area;
- most of the Walman Yawuru witnesses knew their skin and had a general understanding of the skin system and the proper way to marry but most did not follow it, apart from not marrying someone who was biologically close. Most had little knowledge of other peoples' skins;
- the Walman Yawuru witnesses recognised the importance of 'looking after country' and of having a general understanding of the spiritual significance to them of country and the need to protect it;
- their evidence about leaving food as an offering was an example of an observable pattern of behaviour that was not a traditional custom of the Yawuru community;
- matrilineal country holding clans, as they asserted, do not exist under the traditional laws and traditional customs of the Yawuru community;
- the evidence that the Walman Yawuru *rai* as not being site specific was a new idea and witnesses knew only that *rai* came from *Bugarri,* that they were born with it and when they died the *rai* goes back to Walman country or in some cases to *Mangalagun,* as their ancestor's place;
- the expulsion of one family from the clan (who supported the Yawuru claim) did not appear to have any proper basis in traditional law and custom;
- the evidence was consistent with the Yawuru claimants' contention that the present community remains a traditional and observant community but the Walman Yawuru witnesses were generally the least observant (which was not surprising given the urbanisation of Mimi's family in Broome)—at [233] to [239], [241] and [292] to [296].

His Honour noted that the Walman Yawuru clan's 'acknowledgement and observance' evidence was relevant to three issues:

- as the Walman Yawuru clan members were a very small part of the Yawuru community, the conclusion that they were among the least observant members of the community and the rejection of certain 'customs', such as matrilineal descent, would not lead to any reformulation of the conclusions on acknowledgement and observance by members of the Yawuru community;
- as those who claimed group, rather than communal, native title must establish they have rights and interests possessed under the traditional laws and customs acknowledged and observed by that group, the 'acknowledgment and observance' evidence was critical to whether the Walman Yawuru claimants could satisfy s. 223(1)(a);
- it was first necessary to be satisfied that clan-based native title rights and interests claimed are possessed under the traditional laws and customs of the Yawuru community;

- the Walman Yawuru witnesses' evidence, standing alone, did not establish clan-based native title—at [242] to [244].

It was noted that, prior to the dispute, the Walman Yawuru regarded themselves as Yawuru people whose country was Yawuru country:

> [A]ny serious pursuit of a claim that those areas are Walman Yawuru country…only arose as a result of that dispute. It was in those circumstances that the Walman Yawuru case evolved as an idealisation of the present to justify the competing Walman Yawuru native title claim of a clan, rather than a communal, title…As explained above, that evidence was primarily given by persons who, in general, were not well placed or well qualified to give persuasive evidence as to the content of the traditional laws and customs of the Yawuru community—at [244].

His Honour pointed out that evidence given by the Walman Yawuru witnesses was in general terms and 'more as an assertion, rather than as an explanation, of any requirement that, under traditional law and custom, Walman Yawuru country is the country of the Walman Yawuru people or clan'. The main reasons for finding the evidence 'inherently unreliable' were:

- it was based mainly on recollections of what Mimi said more than 50 years ago;
- the written statements made by a number of the Walman Yawuru witnesses prior to the dispute were inconsistent, or difficult to reconcile, with the claim they pursued at trial;
- the finding that these witnesses were among the least observant gave the court little confidence in the reliability of evidence about their knowledge of the 'traditional' laws and customs of that community;
- a number of Walman Yawuru witnesses demonstrated an unwarranted readiness to elevate their assertion of a current practice or belief (for example, leaving food, expelling a family from the clan and matrilineal descent) to traditional law and traditional custom.

On the other hand, the evidence of the Yawuru witnesses as to the content of traditional laws and customs, which was generally preferred to that of the Walman Yawuru was:

- that there was no requirement for permission to enter upon areas to which clan members had an attachment;
- detailed and sourced in the *Bugarrigarra;*
- also supported by the evidence or previous statements of senior 'law men';
- not beset by the problem of wishful reconstruction, misconception of current practice as tradition or an idealisation of the past—at [246].

Merkel J's findings were qualified as, at this point, they did not take into account the anthropological dispute as to clan-based title. The court noted that, if the evidence had supported a clan-based title, this alone would not necessarily resolve the claims of the Walman Yawuru. For that reason, the findings to this point of the decision are based solely 'on the evidence given by the Walman Yawuru witnesses'—at [248].

Anthropological evidence

A number of anthropologists gave expert evidence, earlier anthropological works were referred to and the Yawuru claimants also relied upon anthropological evidence given in *Rubibi*. This summary discusses only the findings on the anthropological evidence in regard to clan estates, a discrete issue at this stage of the proceedings—see [27].

Merkel J regarded the anthropological evidence as important in three ways:

- as a conceptual framework for considering the indigenous evidence of traditional laws and customs:
- for discussions of earlier anthropological works;
- as a source of expert opinions on issues, including whether the Yawuru claimants'

native title claim was a clan or communal title—at [252].

The anthropological evidence included reference to:

- Professor W.E.H. Stanner's work on the nature of clan-based estate proprietary rights of the Yirrkala society;
- reports by the experts for each claim group and the state;
- the 1930s' works by Father Worms as interpreted by Dr Van Gent.

Clan estates

Merkel J referred to his observations in *Rubibi* at [129] to [142], where the issue of clan- or group-based native title was also strongly contested, on continuity and community evolution—at [282].

The longstanding anthropological disagreement over the patriclan estate issue and concepts which underlie it were identified by Merkel J. Principles of Aboriginal landholding identified by Professor Stanner in 'The Yirrkala Case : Some General Principles of Aboriginal Land-Holding' were accepted by other anthropologists but dispute arose about whether or not:

- those principles applied generally throughout Australia and, in particular, whether they applied to the Walman Yawuru and Yawuru claim areas;
- Professor Stanner's dichotomy between primary and secondary rights applied to the Yawuru community because it was an ambilineal or cognatic community with rights in land devolving primarily by descent from either parent—at [306] to [315].

Merkel J summarised his findings on the 'problem' of clan-based claims:

> [T]he traditional anthropological distinction between the 'primary rights' of patriclan members and the 'secondary rights' of non-members at sovereignty is based on a view of an overarching title or ownership in respect of clan country that confers exclusive possession on clan members. However, that approach admits to numerous exceptions, which include spouses, children, band or horde members and 'law business'…[T]hose exceptions may fall within the definition of native title rights and interests under ss 223(1) and 253…Thus, the nature and extent of the acknowledged 'secondary rights' undermines the premise of clan exclusivity or, put another way, of a rule of trespass in respect of clan country—at [354].

His Honour did not accept that, at sovereignty, Yawuru society followed the patriclan estate model or a model with a rule of exclusive possession—at [353] to [355], [357].

Merkel J went on:

> Turning to the society in question in the present case, the 'oral history' evidence and the anthropological evidence... accepted…is unequivocally against the existence of patriclan estates under the traditional laws and customs *now* acknowledged and observed by the Yawuru community…I accept that those laws and customs might have evolved from traditional laws and customs that provided for landholding to be akin to that of a patriclan estate model at or prior to sovereignty…[but t]he more likely hypothesis is that at sovereignty clan members had special attachments to, and responsibilities for, the areas with which the clan members were traditionally associated… I regard it as unlikely that there was a clear rule of trespass or a requirement for permission in respect of Yawuru persons who are not clan members. Plainly, the numerous exceptions referred to above are against such a rule—at [356], emphasis in original.

For these reasons (among others), his Honour did *not* accept that:

- the exclusive native title rights and interests claimed by the Walman Yawuru claimants were held by clan members either at sovereignty or presently;
- the evidence established that such rights and interests are possessed under any

subsequent evolution of those traditional laws and customs—at [357].

It was pointed out that these conclusions were limited to any rights and interests claimed by the Walman Yawuru clan members as such and were not concerned with any native title they may possess as members of the Yawuru community.

Evolution of traditional law and traditional custom—patrifileal to ambilineal

His Honour then turned to the anthropological evidence concerning evolution of law and custom since sovereignty. Having considered the expert evidence on point, his Honour accepted that:

> [I]t is likely that the Yawuru clan members had particular attachments to…areas with which the clan was traditionally or historically associated. However, the attachments and responsibilities, under the traditional laws and customs of the Yawuru people, did not amount to exclusive possession—at [362].

Subject to that qualification, the court accepted the evidence supported an 'evolutionary model' based on contingency provisions that existed under law and custom at sovereignty. This 'significant' conclusion confirmed the court's views that:

- the present cognatic or ambilineal structure and definition of the Yawuru community is in accordance with the traditional laws and customs acknowledged and observed by the Yawuru community;
- a change from a community similar to a patrifileal clan-based community to a cognatic or ambilineal based community is a change of a kind that was contemplated under the 'contingency provisions' of those traditional laws and traditional customs—at [362] and [363].

His Honour then turned to answering three questions identified at [30], noting that it did not determine any of the issues although the questions were based on the findings already made—at [365].

Question 1 – 'What is the relevant 'society?'

Merkel J found that the Yawuru community is a recognisable body of persons united in and by traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue are being claimed.

This finding was made on the basis that:

- the present community is a recognisable body of persons likely to be descendants of members of that community at the time of sovereignty;
- the source of the community's traditional laws and customs is the southern tradition and the holding, passing on and receiving of the community's traditional knowledge and law is laid down in that tradition, which formed part of the traditional laws and customs of the community at sovereignty and is still acknowledged and accepted as governing all aspects of the traditional life of the community;
- the findings on *rai,* Yawuru language, skin system, kinship and *malinyanu* laws and customs, traditional stories, name traditions, hunting and bush foods, looking after and speaking for country, increase sites and permission requirements demonstrate that the present Yawuru community acknowledges and observes the traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue are being claimed;
- while the form and practice of traditional laws and customs had changed in significant respects since sovereignty, those changes fall within traditional 'contingency provisions' premised on the fact that laws and customs evolve in response to new or changing exigencies to which all societies adapt;

- the changes or adaptations in this case were *not* such that it could be said that the native title rights and interests asserted are not possessed under the traditional laws and customs acknowledged and observed by the Yawuru community—at [367] to [369].

Question 2 – 'Are rights possessed and is connection established under traditional law and custom?'

His Honour found that, under the traditional laws and customs acknowledged and observed by the Yawuru community, native title rights and interests in relation to the respective claim areas are possessed by the Yawuru community and that community, by those laws and customs, has a connection with the claim area. It was found (among other things) that:

- under the traditional laws and customs acknowledged and observed by the Yawuru community, native title in the respective claim areas is possessed only by and on behalf of members of the Yawuru community and not any of the clans constituting that community;

- the evidence supported the anthropological view of the 'necessary' relation between 'language and territory' and the linking of the law, tribal boundaries and spiritual connection to country, which is recognised and respected by the senior law men of the southern tradition;

- the co-incident linguistic, law and tribal boundary sourced in southern tradition forms part of the traditional laws and customs acknowledged and observed by the Yawuru community at and since sovereignty;

- the evolution of a cognatic and ambilineal system of descent necessarily brought to an end any patrilineal or similar system and resulted in any traditional laws and customs that once *might* have been possessed by clan members ceasing to form part of the traditional laws and customs presently acknowledged and observed by the Yawuru community;

- insofar as clan members have any special attachment to a specific area that is acknowledged by the Yawuru, it is not such as to constitute or give rise to a native title right or interest, as defined in ss. 223(1) and 253—at [370] to [375].

As to s. 223(1)(b) and 'connection', it was found that:

- while there is no simple dichotomy between traditional laws and customs that are connected with land and waters and those that are not, by almost all of the laws and customs acknowledged and observed by the members of the Yawuru community, the members of that community have the requisite spiritual, cultural and social connection to land and waters in the Yawuru claim area;

- therefore, the Yawuru community, by those laws and customs, has the connection required by s. 223(1)(b) to the area covered by the Yawuru claim;

- by those traditional laws and customs, members of the Walman Yawuru clan do not have such a connection with the Walman Yawuru claim area in their capacity as members of the clan—at [376].

Question 3 – 'Communal or group based native title?'

Based on the conclusions noted above, and without considering the other questions such as extinguishment, his Honour found on an 'interim' basis that the native title rights and interests possessed in the Yawuru claim area are:

- communal native title rights and interests possessed by members of the Yawuru community; and

- not the group native title rights and interests claimed to be possessed by members of the Walman Yawuru clan members.

Determination of native title—Blue Mud Bay

Gawirrin Gumana v Northern Territory (No 2) [2005] FCA 1425

Mansfield J, 11 October 2005

Issues

This case is about the appropriate form of a determination of native title, with the esssential issue being whether the native title holders of parts of Blue Mud Bay in Arnhem Land could exclude fishermen and others from the waters of the determination area. It follows from the decision of his Honour Justice Selway in *Gumana v Northern Territory* [2005] FCA 50 *(Gumana No 1),* summarised in Native Title Hot Spots Issue 14. The other issues are largely concerned with the draft determination of native title submitted on behalf of the native title holders and whether (among other things) it reflected Selway J's reasons for decision.

Background

As Selway J died before final orders were made, the parties consented to his Honour Justice Mansfield completing the hearing for the purposes of making a determination that reflected Selway J's reasons for judgment. Accordingly, the reasons given in this case must be read with the reasons for judgment in *Gumana No 1.*

Selway J had found that:

- a determination of native title should be made in favour of the native title claim group under s. 225 of the *Native Title Act 1993* (Cwlth) (NTA);
- a native title right of possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) existed over part of the claim area; and
- certain non-exclusive native title rights and interests existed over the remainder of the claim area, made up of the inter-tidal zone and the adjacent waters, i.e. the area of the foreshore between high water mark and low water mark and the area of rivers, streams and estuaries affected by the ebb and flow of the tides.

Utility in determination over Aboriginal lands

Selway J had questioned the utility of making a determination of native title in respect of the part of the claim area subject to grants under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the Land Rights Act) to the Arnhem Land Aboriginal Land Trust (the Aboriginal lands).

Mansfield J concluded that there was utility in such a course for various reasons, including:

- there is no apparent legislative intent in the NTA to exclude land grants under the Land Rights Act from being the subject of a determination of native title;
- the nature of native title rights and interests under the NTA is conceptually different from the rights granted under the Land Rights Act;
- a grant under the Land Rights Act is not predicated upon the existence of Aboriginal traditions, and rights and interests held under those traditions, which have their origin in pre-sovereignty laws and customs and does not require the continuous existence and vitality of a normative system of traditional laws and customs since sovereignty under which those rights and interests are possessed, as is necessary for recognition as native title holders under the NTA;
- hence, the 'status' of persons recognised as native title holders over particular land may be different from persons who are beneficiaries of a grant under the Land Rights Act in respect of the same land;
- a determination of native title finally determines the existence and nature of native title rights and interests whereas a grant under the Land Rights Act can be surrendered, revoked or acquired in cases

where native title may nevertheless survive (note that areas subject to a native title determination under the NTA can also be surrendered or acquired); and

- there is an issue as to whether native title has been extinguished by certain roads excluded from the Land Rights Act grant—at [13] to [18].

Rivers, streams and estuaries

The issue here was whether the public right to fish extended into tidal waters that are not navigable. If that public right did not extend to those areas, it was arguable that 'exclusive' native title could be recognised because there would be no inconsistent common law public rights.

Mansfield J noted that Selway J had:

- defined 'inter-tidal zone' to refer to both the area of foreshore between the low and high water mark and the area of rivers, streams and estuaries 'affected by the ebb and flow of the tides';

- found native title rights to the intertidal zone were non-exclusive because he was bound by *Commonwealth v Yarmirr* (1999) 101 FCR 171 to hold the fee simple to the Aborignal lands was qualified so as not to exclude those exercising (among other things) public rights to fish and to navigate;

- concluded that the decision in *Yarmirr* also applied to those parts of estuaries or navigable rivers where the waters are affected by the flow or ebb of the tide—at [23].

The first issue for the court was whether Selway J had resolved the question of whether or not the public right to fish extended to the non-navigable parts of tidal waters in rivers, streams and estuaries. Having considered the reasons for judgment at [80] and [87], Mansfield J concluded the reasons indicted that:

> [T]he public right to fish…was exercisable in the inter-tidal zone, including tidal waters, whether those waters are navigable or not. The public right to navigate is necessarily confined to tidal waters which are navigable—at [31].

Inland waters

Mansfield noted that the parties essentially agreed:

- about the nature of the native title rights and interests to be recognised over the land and inland waters of the determination area, i.e. the applicants should have possession, occupation, use and enjoyment to the exclusion of all others;

- that Selway J did not intend to recognise a native title right of 'ownership' in the waters on that part of the land and inland waters area of the claim, in the sense of an exclusive right to ownership of those waters;

- by virtue of the exclusive right to possess that part of the claim area, the native title holders had the right to control access to the waters on that part of the claim area and the right to use and enjoy (i.e. take and use) those waters while they are on that area—at [40].

Therefore, it was a 'matter of drafting' as to how that state of affairs should properly be reflected in the proposed determination—at [40].

Mansfield J referred to Selway J's reasons and noted that:

- normally the owner of land does not 'own' everything physically on it, that 'ownership' of free flowing water was not sensible and that the owner has a right to control access to that water and to use it for their own purposes;

- 'ownership' or the 'belonging' of things like free flowing water meant (according to the applicants' evidence) the right to use the water while they were on their country rather than a right of dominion over it;

- native title holders cannot obtain exclusive water rights in free flowing or subterranean waters;

- the form of determination proposed was the same as that made in *Passi v State of Queensland* [2001] FCA 697 and as recognised in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 217;

- the applicants contended that the proposed determination, by declaring exclusive possession of the land and inland waters, operated within a legal framework that the owner of the land had only the rights to control access to the waters thereon and to take and use those waters while on the land—at [36] to [38] and [41].

In accepting that what the applicants proposed was consistent with Selway J's reasoning, the court noted that:

> It does not mean that…[the native title holders] have some additional or unique form of right in respect of subterranean or flowing water on that part of the claim area within the defined section 'land and inland waters'. It means simply that…they have the exclusive right to control access to the water within that part of the claim area and to use and enjoy it—at [43].

Description of other interests in land and inland waters

In deciding that the determination should more comprehensively describe the other interests in the land and inland waters, particularly relating to rights of entry under a number of enactments, his Honour noted that:

- 'interests' as defined in s. 253 include statutory rights of access and so these should be described in the determination;

- paragraph 225(c), in conjunction with s. 94A, requires a determination to provide details of 'the nature and extent of any other interests in relation to the determination area';

- it would be unsafe to endeavour to provide an exhaustive list of such enactments as some relevant statutory provision might be overlooked;

- a reference to those exercising statutory rights or privileges would not extend to members of the public purporting to exercise common law rights and persons seeking access pursuant to any interests arising from an invalid future act;

- Selway J contemplated such a 'catch-all' description—at [48] to [54].

Non-exclusive native title rights and interests extend to use of resources

The territory argued that, in the area where non-exclusive native title rights and interests were recognised :

- native title rights and interests recognised should not extend to the 'use' of the resources of the area; and

- the word 'resources' should be confined to 'living and plant resources'.

Mansfield J rejected the territory's submissions essentially because the formulation proposed by the applicants reflected Selway J's reasons for judgment—at [57] to [59].

Right to protect sites rejected

His Honour agreed to delete the word 'protect'; from the proposed right to 'maintain or protect' sites because:

- there was no such right in the determination in *Lardil Peoples v Queensland* [2004] FCA 298, which Selway J had adopted; and

- it included a right to exclude others from those sites that was inconsistent with common law public rights to fish and navigate—at [60] to [62].

With respect, this seems to be at odds with the findings of the Full Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [140], summarised in this issue of *Native Title Hot Spots.*

Commercial native title rights to inter-tidal resources rejected

The applicants submitted that rights to hunt, fish, gather and use the resources of the inter-tidal zone should extend to commercial purposes, arguing that it was only in the case of the 'outer' waters that these rights should be confined to non-commercial purposes.

Mansfield J concluded that Selway J:

- regarded any rights possessed under traditional laws and customs to use the waters of the inter-tidal zone and outer waters for commercial purposes were rights that could not be recognised by the common law of Australia as required by s. 223(1)(c) and so should not be the subject of a determination;
- recognised that fishing, gathering and using resources within the area would include the exchange of those resources.

Therefore, no commercial native title right was recognised. Rather, it was held that the applicants have the right to hunt, fish, gather and use resources within the area (including the right to hunt and take turtle and dugong) for personal, domestic or non-commercial exchange or communal consumption for the purposes allowed under their traditional laws and customs—at [71].

Right to control access of Aboriginal people in non-exclusive areas

The applicants sought recognition of a native title right to control access to certain sites by Aboriginal people governed by traditional laws and customs. Mansfield J was of the view that:

> [What the applicants]…proposed is not fully consistent with his Honour's determination and should be permitted to remain only on the basis that it is expressed to refer to those Aboriginal people who recognise themselves as governed by those traditional laws and customs. It cannot operate more extensively—at [74], cf Full Court in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [151], summarised in this issue of *Native Title Hot Spots.*

Other interests in the inter-tidal zone

His Honour agreed with the respondents that:

- people holding licences to fish granted under the *Fisheries Act 1988* (NT) (Fisheries Act) should be described 'generically' rather than by name; and
- licensed persons should include those licensed under regulations.

This would:

- accommodate the fact that licences under the Fisheries Act are generally renewable annually and that some are transferable;
- ensure that the passage of time did not result in the guidance the determination should give losing utility;
- enable identification of those holding such rights at the time of the determination as distinct from some later time—at [76] to [77].

His Honour also agreed that the determination should recognise as 'other interests' in the intertidal zone:

- rights of access by an employee, servant, agent or instrumentality of the Northern Territory, Commonwealth or other statutory authority as required in the performance of his or her statutory duties; and
- the interests of persons to whom valid and validated rights and exercise have been:
  - granted by the Crown pursuant to statute or otherwise in the exercise of its executive power; or
  - otherwise conferred by statute.

It was noted that the objective of s. 225 was to secure clarity and certainty in the determination—at [79].

Other interests: public roads and public works

The respondents contended that the determination should expressly exclude land over which there was a public road at 26 January 1977 or 30 May 1980 (such roads being excluded from land grants under the Land Rights Act). Mansfield J found that there was no apparent arguable factual foundation in the reasons for judgment to allow for the inclusion in the determination of a reservation relating to public roads and public works—at [85] to [86].

Conclusion and subsequent orders

Subject to the matters noted above, his Honour was satisfied that the draft determination proposed by the applicants gave effect to Selway J reasons for judgment and so made a determination recognising native title and consequential orders, including that:

- native title is not to be held on trust;
- an Aboriginal corporation must be nominated within 12 months (or such other time as the court allows) to be the prescribed body corporate: see ss. 57(2) and 57(3); and
- each party and the intervenor (the Commonwealth Attorney-General) bear their or its own costs of the proceeding.

Authorisation—claimant application

Davidson v Fesl [2005] FCAFC 183

French, Finn and Hely JJ, 30 August 2005

Issue

This case is about an application for leave to appeal against:

- a grant of leave to discontinue a claimant application;
- a refusal to replace the applicant in that application by exercising the discretion available under s. 66B(2) of the *Native Title Act 1993* (Cwlth) (NTA).

Central to both issues was the status of a claimant application in circumstances where 'the applicant' (defined in s. 61(2) as the person or persons who jointly constitute the applicant) was not authorised to do so by the native title claim group.

Background

This case relates to a claimant application filed in the Federal Court in 1999 by Dr Eve Fesl. When it was considered by the court, the native title claim group was described as:

> The Gubbi Gubbi biological descendants who are matrilineally descended from [certain names of ancestors]…The surviving matrilineal descendants on whose behalf the claim is made are Evelyn Serico, Clifford Monkland, Lois Gulash, Eve Fesl, Nurdon Serico, Helena Gulash, Drew Gulash and future descendants.

The background to this case is discussed in *Fesl v Queensland* [2005] FCA 120, summarised in *Native Title Hot Spots* Issue 14. In that case, his Honour Justice Spender:

- granted Dr Fesl leave to discontinue the application; and
- refused an application made by Alexander Davidson and others to replace Dr Fesl as applicant under s. 66B.

At [12] to [14], the Full Court noted Spender J's primary reasons for granting leave to discontinue:

- the proceeding was likely to be held to be 'flawed from the outset' or 'foredoomed to fail' because:
  - no-one (including those making the s. 66B(1) application) contended that Dr Fesl was authorised to make the application as required by s. 61(1);
  - therefore, the application was not a 'claimant application', which s. 253 defines as one in which the 'applicant' is authorised by 'the native title claim group';
- authorisation as a fact is a threshold requirement for the operation s. 66B;

- therefore, that section could not operate to allow for the replacement of Dr Fesl.

His Honour referred to Landers J in *Williams v Grant* [2004] FCAFC 178 at [53]:

> Section 66B assumes that the current applicant, who is sought to be replaced, had authority to bring the claim at the time the claim was made…The section only applies where the current applicant is 'no longer authorised' or 'has exceeded the authority given to him or her by the claim group'.

The appeal

Those who made the s. 66B(1) application sought leave to appeal against Spender J's decision, submitting that Dr Fesl's admission that she did not have the authority of all members of the claim group to exercise the power of an applicant:

- meant she had no power to discontinue the claim;
- did not render the claim void from the beginning *(ab initio);* and
- supported the s. 66B(1) application for her replacement by persons authorised by members of the native title claim group—at [18].

Authorisation, standing and the threshold question

In a joint judgment, their Honours Justices French, Finn and Hely noted that:

- the definition of 'native title claim group' in ss. 61(1) and 253 is of importance because standing to bring a claimant application is confined to a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group;
- it was 'significant' that s. 61(1) appeared to require that those authorising the applicant (i.e. the native title claim group) were native title holders and not 'mere' claimants;
- it followed that, while authorisation 'can be regarded, from some points of view, as a threshold requirement for an application', it can never be resolved in favour of the applicant until the application is finally determined—at [2] to [3] and see s. 13(1).

Comment—authorisation threshold

In this context, note that authorisation appears to be a 'threshold' condition in a s. 66B(1) application, since it has been held that those making the application must satisfy four conditions:

- there is a claimant application (which is defined as noted above);
- each applicant for an order under s. 66B(2) is a member of the native title group;
- the person to be replaced is either no longer authorised by the claim group to make the application and to deal with the matters arising in relation to it or has exceeded the authority given to them by the claim group;
- the persons making the application under s. 66B(1) are authorised by the claim group to make the application and to deal with matters arising under it—French J in *Anderson v Western Australia* (2003) 204 ALR 522 at [17].

Criteria for grant of leave

In considering the application for leave to appeal, the court identified the 'primary' criteria for granting such leave:

- whether, in all the circumstances, the decision of Spender J was attended with sufficient doubt to warrant its reconsideration on appeal;
- whether substantial injustice would result if leave were given, supposing Spender J's decision to be wrong—at [21], referring to *Décor Corporation Pty Ltd v Advance Industries Inc* (1991) 33 FCR 397 at 398-9.

First criterion—finding that lack of authorisation was irreparable defect

As noted above, Spender J found that, where an application was not initially authorised, it was not a 'claimant application' and s. 66B had no application because authorisation was 'a threshold requirement' to the operation of that provision. The court noted that this view of the 'initial authorisation requirement' may be 'debatable', going on to say that:

- it was not clear whether or not Spender J intended to characterise a lack of initial authorisation as 'an irreparable defect';
- either way, it was clear that his Honour thought that such a 'defect' could not be repaired by way of an application under s. 66B for a 'change' in those named as the applicant—at [22].

This raised a question: Can a claimant application 'deficient in initial authorisation' be permitted to continue 'without any possibility' of rectification? While they didn't need to decide the point in this case, their Honours had 'serious doubts that such a result was intended by the legislation' and so, in considering the first criteria for the grant of leave, it was noted that some aspects of Spender J 's reasons 'may be attended with some doubt'—at [22].

So, it appears that a 'defect' or 'deficiency' in initial authorisation could, in an appropriate case, be rectified by the court, although it is not clear whether this would be via s. 66B or some other means.

Second criterion—grant of leave would result in substantial injustice

Those appealing against Spender J's decision also challenged:

- the factual conclusion that Dr Fesl lacked 'initial' authorisation;
- the weight attributed, or not attributed, to other matters, e.g. whether the original application was ratified by the Gubbi Gubbi people at a meeting in October 2004.

The court found that:

- the practical considerations in this case, which included the 'wide diversity of opinion as to what is the correct claimant group' and 'the serious disagreements' about identification of the proper claimant group, 'overwhelmingly' supported the proposition that no substantial injustice would be suffered by any party if leave were refused;
- the definition of the native title claim group, which is of 'great importance', was 'curiously constrained' in this case and while it was so constrained and contentious, it was difficult to see how the question of authorisation, which depended upon that definition, could 'ever satisfactorily be resolved';
- doubts had been raised about the adequacy of the notification and the participation in the 'authorisation' meeting relied upon by those making the s. 66B application and the minutes of the authorisation process for the initial application by Dr Fesl also raise doubts about participation by key elements of the defined native title claim group;
- the evidence of prejudice to those seeking leave to appeal was not very specific and, in any event, may depend upon the scope of the native title claim group as defined—at [24] to [27].

Therefore:

> [T]here is no substantial injustice arising from the discontinuance of the native title determination application. In fact there are considerable benefits to be gained in the opportunity that is now provided for a more thorough consideration of the scope of the native title claim group and the steps necessary to ensure that proper authorisation by that group is secured from named applicants—at [27].

Decision

For the reasons given above, the application for leave to appeal was dismissed—at [28].

Costs

Counsel for the various respondents sought an order for costs. Counsel for the applicants resisted, referring to s. 85A. In their Honours' opinion:

> [T]here was no demonstrable benefit to indigenous interests flowing from the bringing of the application for leave. There is plainly a practical need to focus upon sorting out differences between the various elements of the Gubbi Gubbi people that have hitherto impeded the development of a properly defined native title claim group which could advance its native title claim as one. Collateral litigation of this kind does not serve the purposes of the Act—at [29].

However, the parties were given leave to make submissions as to costs.

Noble v Mundraby [2005] FCAFC 212

North, Weinberg and Greenwood JJ, 30 September 2005

Issue

The main issue in this appeal to the Full Court of the Federal Court was whether the authorisation provisions of s. 251B of the *Native Title Act 1993* (Cwlth) (NTA) had been applied correctly to support the removal and replacement of the applicant under s. 66B(2).

Background

Frederick Noble sought to appeal against a decision of his Honour Justice Spender in *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2004] FCA 1703, summarised in *Native Title Hot Spots* Issue 13. Spender J determined an application made under s. 66B(1) by Vincent Mundraby, Les Murgha and Stewart Harris seeking removal of Mr Noble from the group of people named as 'the applicant' in a claimant application that was a combination of several earlier claimant applications. On the definition of 'the applicant', see ss. 61(2) and 253.

The question of whether leave to appeal was required was raised. The court determined that, whether or not leave was required, it would need to consider the merits of the appeal and so approached the case on that basis—at [6].

At first instance

Spender J considered evidence of a meeting of the members of the combined claim group before concluding that:

- the meeting voted to remove Mr Noble and replace him with Charles Garling;
- the minutes of the meeting supported the finding that 'all the persons in the native title claim group' had authorised the latter named individuals;
- the claim was a joint (combined) claim and 'all the persons in the native title claim group' were not the Gunggandji People, the Yidinji People or the Mandingalbay People but all the people in the native title claim group for the combined claim, i.e. all three groups;
- the requirements of authorisation under s. 251B relate to authorisation by all the members of the claim group, not a sub-group;
- Mr Mundraby, Mr Murgha, Mr Harris and Mr Garling were authorised under s. 251B of the NTA.

On appeal— proof of decision-making system required?

It was argued for Mr Noble that:

- Spender J should have received evidence and made findings as to whether the process used at the meeting was agreed to and adopted by the claim group, as contemplated by s. 251(b), given there was dispute about it at the meeting; and
- subsection 251B(b) refers to 'a process of decision-making' and that requires proof of

some system of decision-making, not merely evidence of the way in which a 'one-off' decision was made.

Their Honours Justices North, Weinberg and Greenwood, in a joint judgment, noted that Spender J:

- appreciated the need to identify the appropriate decision-making process and to determine whether that process had been followed;
- rejected the argument that individual sub-group processes governed authorisation for the combined claim;
- stated that the conditions for the making of the order had been met—at [16].

The court held that:

- Spender J found that the members of the claim group agreed that the vote at the community meeting was a process of decision-making for the purpose of authorising the applicant for the claimant application;
- the members of the native title claim group then adopted that process;
- based on the evidence, it was open to the court to conclude that, by voting on the motions put to the meeting, those present agreed to a process of authorisation under s. 251B(b) by a vote of all the members of the native title claim group—at [16] to [18].

Section 251B

It was observed that s. 251B:

- does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question;
- accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision, even if other procedures are normally used for other decisions;
- does not require a formal agreement to the process adopted for the making of a particular decision; and
- contemplates that agreement may be proved by the conduct of the parties—at [18].

In this case, the court noted that there was evidence that:

- the claim group conducted itself at the meeting on the basis that it agreed to a vote by the members of the group to determine the question of authorisation;
- all persons present voted in favour of the motion;
- nobody was recorded as leaving the meeting or refusing to vote or in any other way conducting to indicate dissent from the course adopted—at [18].

Decision

It was held that Mr Noble could not succeed in an appeal because there was evidence from the conduct of the claim group on which Spender J could base his conclusion that the requirements of s. 251B(b) were satisfied. Therefore, if leave to appeal was required, such leave was refused and, if not, the appeal should be dismissed—at [18] and [19].

Noble v Murgha [2005] FCAFC 211

North, Weinberg and Greenwood JJ, 30 September 2005

Issue

The main issue in this appeal to the Full Court of the Federal Court was whether the authorisation provisions of s. 251B of the *Native Title Act 1993* (Cwlth) (NTA) had been applied correctly to support the removal and replacement of the applicant under s. 66B(2).

Background

This case deals with an application for leave to appeal from a decision of his Honour Justice Dowsett to make an order under s. 66B(2) that

Frederick Noble be removed from the group of three people who were jointly the 'applicant' in the Combined Gunggandji native title claim and that the two remaining people were authorised under s. 251B to 'replace' the applicant. The claim group in this matter consisted of the members of three clans, each associated with one of the three individuals in question. On the definition of 'the applicant', see ss. 61(2) and 253.

The Gunggandji people were involved both in this claim and in the combined Mandingalbay Yidinji-Gunggandji claim. The State of Queensland had offered to settle both. Mr Murgha and Mr Harris favoured accepting that offer but Mr Noble did not and declined to sign the necessary documentation. (On the removal of Mr Noble under s. 66B(2) in the other matter, see *Noble v Mundraby* [2005] FCAFC 212, summarised in this edition of *Native Title Hot Spots*.) A meeting of the Combined Gunggandji claim group was held in November 2004 to resolve the impasse.

At first instance

At first instance, Dowsett J:

- found, as a fact, that the Combined Gunngandji claim group decided at a meeting in November 2004 to refer the possible removal of Mr Noble to the elders for their decision and to abide by that decision;

- noted that Mr Noble did not accept that the laws and customs of that group provided for that course to be followed but rejected Mr Noble's complaint, basing his decision upon the reasoning of Spender J *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2004] FCA 1703, summarised in *Native Title Hot Spots* Issue 13 and see *Noble v Mundraby* [2005] FCAFC 212, summarised in this edition of *Native Title Hot Spots;*

- found, as a fact, that the elders unanimously agreed that Mr Noble should be removed and advised the meeting accordingly;

- apparently decided that s. 251B(b), rather than s. 251B(a), was satisfied.

Section 251B is pivotal

In a joint judgment, their Honours Justices North, Weinberg and Greenwood commented that:

> Section 251B…is pivotal. It makes provision for the authorisation of a person or persons to make a "native title determination application" on behalf of a "native title claim group". Relevantly, it provides that all the persons in such a group can authorise a person or persons to make such an application, and to deal with matters arising in relation to it, provided that one or other of the…conditions [in 251B(a) or (b)] is satisfied—at [7].

The two relevant 'conditions' are:

- where there is a process of decision-making that, under the traditional laws and customs of the…native title claim group…must be complied with in relation to authorising things of that kind—the persons in the native title claim group…authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

- *where there is no such process*—the persons in the native title claim group…authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group…in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind—see s. 251B(a) and (b).

The appeal

Their Honours noted that the evidence in this case was that:

- the authorisation meeting was publicised, including via advertisements in newspapers, and notices were sent well in advance to all Gunggandji people;

- those who attended were provided with a proposed agenda, two proposed resolutions and reasons why the meeting was necessary;
- Dr Gaye Sculthorpe, a member of the National Native Title Tribunal, and Mr Murgha chaired the meeting;
- during the course of the meeting, s. 251B was discussed;
- all those present at the meeting agreed there was a decision-making process under Gunggandji traditional law and custom applicable to the decision whether Mr Noble should be removed, described as 'the elders meet and decide' and Gunggandji people accept and respect decisions of the elders;
- when the resolutions were put to the meeting, there was no dispute that it was up to the elders to make the decision and all those who were not Gunggandji elders left the meeting, with no-one raising concerns about the process;
- after the elders discussed the matter, the other members of the group came back to the meeting, except Mr Noble and his family, who had left;
- the elders advised the meeting that Mr Noble should be removed and Mr Murgha and Mr Harris should, in future, be 'the applicant';
- the meeting 'accepted and respected' that decision.

The evidence as to what happended at the meeting, as given by Mr Murgha, was supported by evidence from four other Gunggandji elders who participated and by the minutes of the meeting prepared by Dr Sculthorpe—at [11] to [20].

Submissions on appeal

It was argued for Mr Noble that:

- it was implicit from his Honour's reasons that he relied upon s. 251B(b) as the basis for ordering Mr Noble's removal;
- that 'condition' required evidence of the existence of a systemic decision-making process that had been agreed to, and adopted, before the ultimate decision to remove him was made;
- the evidence did not demonstrate the existence of such a process, referring the 'elaborate' analysis of s. 251B in *Daniel v Western Australia* (2002) 194 ALR 278 (summarised in *Native Title Hot Spots* Issue 2) to support a contention that Dowsett J's 'sparse' reasoning did not meet the requirements of that section.

Mr Murgha and Mr Harris submitted that:

- there was nothing in the language of s. 251B(b) that required an anterior systemic process to have been agreed, or adopted;
- a court could infer that a process of decision-making had been agreed, or adopted, from the conduct of a meeting that voted on a resolution to have an applicant removed, particularly when it appeared that the vote was unanimous;
- in the present case, the elders had unanimously determined that Mr Noble should be removed and their decision had been accepted, apparently without dissent.

Decision

While acknowledging that Dowsett J's reasons for decision were 'brief in the extreme' (amounting to only four paragraphs), their Honours were not persuaded that Dowsett J erred in finding that the requirements of s. 251B(b) were met.

In particular, the court said:

> We are unable to accept the submission that there must be a system of decision-making, separately agreed and adopted, before the members of the native title claim group can validly resolve to remove a person from the group that is "the applicant" in a native title determination application—at [34].

While noting that Dowsett J concluded that all of the requirements of s. 66B had been satisfied 'without elaboration' and 'without any detailed reasons', it was found that this, of itself, did not show an appellable error. Therefore, if leave to appeal was required, it was refused and if not, the appeal was dismissed—at [35].

Comment on meaning of 'the applicant'

At [6], their Honours observed that one of the notes to s. 61(1) states that the person or persons who make up the group of people authorised by the native title claim group 'will be the applicant' and this explained 'why the somewhat awkward designation "the applicant" is applied to a group of individuals, each of whom is separately named'. However, with respect, it is s. 61(2)(c) that so provides. Note also that s. 253 provides that 'applicant' has 'a meaning affected by' s. 61(2).

Want of prosecution

Pappin v NSW Minister for Land & Water Conservation [2005] FCA 1430

Stone J, 12 October 2005

Issue

This case deals with whether a claimant application and three related compensation applications should be dismissed for failure to prosecute the proceedings with due diligence. The court decided to dismiss all four.

Background

At a directions hearing held on 1 September 2005, the court was told the applicants were aware that they were required to take steps to progress their application or they would be liable to be dismissed. As counsel for the applicants was content for the applications to be dismissed, her Honour Justice Stone made orders accordingly pursuant to O 35A r 3(1) of the Federal Court Rules and indicated she would provide written reasons at a later date. This is a summary of those reasons.

Since July 2001, the parties have been engaged in mediation of the claimant application, including mediation of disputes within the claimant group. However, those attempts have been largely unsuccessful. Her Honour Justice Stone noted that:

- in its present form, the claimant application had a number of problems, including the description of the claimant group and the lack of connection material;
- the applicant had not taken any significant steps to progress the matter for a number of years;
- since October 2000, the claimant application had been before the court or a registrar of the court 15 times without any appreciable progress being made—at [7].

Decision

In relation to the claimant application, Stone J found that:

> [T]he applicant, in failing to take adequate steps to prosecute the proceeding, was in default under O 35A r 2(1)(f) of the Federal Court Rules. As such, the Court is empowered to dismiss the application pursuant to O 35A r 3(1). I accept that the failure to prosecute the claimant application is not due to deliberate neglect on the part of the applicant…Further, the applicant… appears to be actively engaged in negotiations with third parties in respect of matters outside the scope of the NTA. *However, this does not alter the fact that the applicant has not taken adequate steps to prosecute its claim under the NTA. It is the claimant application before the Court and the claims made therein that the applicant must prosecute with due diligence.* In my opinion, this has not been done.

> The above comments in respect of the claimant application…apply with equal weight to the compensation claims—at [8] to [9], emphasis added.

The claimant application and the related compensation applications were all dismissed, with the court noting that (among other things) New South Wales Native Title Services will continue to conduct anthropological and historical research in the claim area and assist the claimants in their negotiations outside the scope of the NTA—at [10].

Major disturbance—future act determination appeal

Little v Oriole Resources Pty Ltd [2005] FCA 506

29 April 2005, Nicholson J

Issue

This case is about the interpretation of s. 237(c), one of the criteria for determining whether or not a future act attracts the expedited procedure. It revolves around questions of 'major disturbance'. The National Native Title Tribunal had previously decided, pursuant to s. 32(4), that the grant of a miscellaneous licence under the *Mining Act 1978* (WA) was an act attracting the expedited procedure. This case deals with an 'appeal' under s. 169 against that determination. Further background and the Tribunal's determination can be found in *Little/Oriole Resources Ltd/Western Australia* [2004] NNTTA 37, summarised in Native Title Hot Spots Issue 10.

Background

The State of Western Australia issued a s. 29 notice that included a statement that it considered the grant of a miscellaneous licence for 'mine site accommodation and associated facilities' (the new licence) was a future act that attracted the expedited procedure and, therefore, not one to which the right to negotiate applied. The licence, if granted, would cover approximately 120 hectares.

The native title party objected under s. 32(4) to the inclusion of the statement that the act attracted the expedited procedure, relying solely on s. 237(c) to support that objection, which provides that a future act is an act attracting the expedited procedure if it 'is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned'.

Before the Tribunal, the beneficial owner of Oriole Resources (the grantee party) said that:

- mine site accommodation infrastructure was already in place in an area wholly within a previously granted licence (the current licence) which covered an area of 8.75 hectares;
- the area covered by the current licence was wholly within the area covered by the new licence; and
- the only construction it intended to do on the new licence area was power line easements and access tracks for firebreaks and rubbish disposal.

It was not disputed by the parties that the new licence would give Oriole Resources the legal right to extend the mining camp infrastructure throughout a much larger area than under the current licence.

Tribunal's determination

On the available evidence, the Tribunal was satisfied that:

> [T]he Australian community as a whole, in the absence of any evidence of the concerns (if any) and views of the Aboriginal people in the locality, would consider the grant of the Licence and the exercise of the rights created thereby to be no more than another aspect of the conduct of the Mining and Exploration Industry in an area, presently and over many years the subject of considerable mining and exploration activity and that whilst the exercise of such rights will result in or involve disturbance to the land, in all of the circumstances it is not likely to involve "major" disturbance or to create rights whose

exercise is likely to involve major disturbance in the ordinary meaning of that expression—at [27].

Therefore, the Tribunal determined that the expedited procedure was attracted.

The appeal

Nine grounds of 'appeal' were raised. The court dealt with them under five headings, each of which is summarised below. None of the nine grounds were made out. As his Honour noted:

> It is important that it be understood that the grounds of appeal are required by s 169 of the NT Act to bring to this Court a question of law. It is only if the Tribunal is in error of law that this Court can interfere with the conclusion which it reached. It is for the Tribunal to find the facts and to weigh those facts as found. In the absence of error of law, it is not for this Court to substitute its view for the view of the Tribunal, provided the Tribunal did not fall into error of law and in particular took into account relevant considerations and did not take into account irrelevant considerations—at [60].

Note that, in hearing a s. 169 application, the Federal Court exercises its original jurisdiction: *Hicks v Western Australia* [2002] FCA 1490 at [12] per French J.

Failure to take a relevant consideration into account

The first ground of appeal was that the Tribunal made an error of law in failing to take into account a relevant consideration, namely the Tribunal's own finding that the grant of the new licence may create rights 'whose exercise was likely to involve major disturbance to the land or waters concerned'. The relevant part of s. 237 provides that:

> A future act is an act attracting the expedited procedure if...(c) the act is not likely to involve major disturbance to any land or waters concerned [first limb] or create rights whose exercise is likely to involve major disturbance to any land or waters concerned [second limb].

The applicant accepted that the Tribunal should have considered the rights created in the context of any applicable regulations or conditions minimising issues of disturbance to the land or waters concerned but submitted that:

- the second limb of s. 237(c) attaches the predictive element to the creation of rights, but not to the exercise of them, and requires reference only to rights that, *if exercised,* are likely to involve major disturbance;
- there is an element of predictive assessment associated with the second limb but that assessment applies only to the issue of the creation of rights rather than their exercise;
- the new licence would create rights to build a mining camp and the exercise of rights of that kind must necessarily be likely to cause a major disturbance, even when subject to such regulations or conditions and the Tribunal was bound to make a finding to that effect—see [18] to [19].

The state submitted (among other things) that:

- under either limb of s. 237(c), a predictive assessment must be undertaken, having regard to the rights which are created at the time of the grant;
- there is work left for the second limb to do in respect of future acts which may involve the subsequent creation of rights as, for example, an act constituted by the grant of an exploration licence which contains within it a right to the grant of a miscellaneous licence—at [24].

His Honour Justice R.D. Nicholson reviewed the Tribunal's determination and the relevant authorities. In particular, it was noted that the Tribunal's approach to the application of s. 237(c) in this matter was the same as it took in *Western Australian v Smith* (2000)163 FLR 32, an approach that was not put in issue on appeal: see *Smith v Western Australia* (2001) 108 FCR 442 *(Smith).*

Nicholson J held that this ground of appeal was not made out, referring to *Smith* at [23], where French J said of s. 237:

> The Tribunal is…required to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in pars (a), (b) and (c) of s 237. That involves a predictive assessment not confined to a consideration of the legal rights conferred by the grant of the proposed tenement.

Little v State of Western Australia [2001] FCA 1706 at [69], which is to the same effect, is also cited. The court concluded that the state was correct in its view as to the application of the second limb of s. 237(c).

Error in interpretation of 'major disturbance'

The applicants argued that the construction of a mining camp would involve a 'major disturbance' as referred to in the first limb of s. 237(c) because (among other things):

- the grant of a new licence would create rights to build mine site accommodation and associated infrastructure throughout the licence area, which must raise a likelihood that the whole of the licence area would be so used;
- such activities are likely to cause a disturbance to the land and waters concerned that would be considered 'major' by the standards of the general community;
- in the absence of any evidence of intention, the Tribunal is at liberty to assume that a grantee will fully exercise the rights conferred by the tenement, referring to *Silver v Northern Territory* (2002) 169 FLR 1 at [30] to [32].

His Honour noted that:

- the word 'major' is an adjective of degree and the Tribunal must make a value judgement that was 'contextual', i.e. the extent of interference and the proximity of its causal connection to the future act proposed should not be considered in isolation;
- the Tribunal's function was to consider all the relevant evidence placed before it and then to determine whether any disturbance to land or waters can be properly characterised as 'major'—at [32] to [34] referring to *Dann v Western Australia* (1997) 74 FCR 391 *(Dann)* at 395 and 401; *Smith* at [27].

These authorities supported the conclusion reached in relation to the first appeal ground, i.e. the application of the first limb of s. 237(c) requires examination not only of the rights created by the future act but also 'a predictive assessment in relation to those rights and all the circumstances of the matter'—at [35].

His Honour noted that:

- the Tribunal was required to have regard to the rights created and, in this case, noted that the grant of the new licence would create rights 'whose exercise may involve major disturbance';
- therefore, it was clear 'beyond reasonable doubt' that the Tribunal had regard to the rights which were created;
- however, the Tribunal also made the predictive assessment in the circumstances of the particular case as it was required to do—at [36].

In these circumstances, the court found that:

> The Tribunal would have fallen into error of law if, having reached the view that the Licence authorised the construction of a mining camp, it did not make a predictive assessment as to whether it was likely to involve major disturbance. That necessarily required it to go to the evidence and not simply to the dictionary definition of 'mining camp'…If the Tribunal approached the first limb in that way it would necessarily be isolated from relevant evidence and would fall into error or law by failing to have regard to that evidence—at [37].

Therefore, his Honour found that this ground of appeal was not made out.

Wrong test and irrelevant considerations taken into account: history of mining and exploration

The applicants argued that the Tribunal erred in:

- relying on the history of mining and exploration in the context of the views of the Australian community and because it led to an assumption being made that further mining and exploration would not amount to a major disturbance;
- not taking into account the lack of any evidence of actual past use of the area concerned and because, in any case, past activity was irrelevant (but note his Honour found that there was evidence of actual use of the area);
- not establishing that all the past or present tenements concerned related to the area covered by the new licence.

Nicholson J found that:

- the Tribunal did not err in having regard to the history of mining and exploration in the general area of the land and waters concerned;
- it was appropriate for the Tribunal, in the course of making the required predictive assessment, to have regard to the context of the act where evidence was provided; and
- it was not an error of law in that regard or in regard to forming a view in relation to the Australian community—at [44].

No error in having regard to absence of the views of local Aboriginal people

His Honour found that the Tribunal:

- did not err in having regard to the absence of the views of local Aboriginal people;
- clearly understood that, as a result of the decision in *Dann* (which it cited) the views and concerns of the local Aboriginal community was a relevant consideration;
- proceeded to have regard to all evidence properly before it—at [45] to [53].

Unreasonableness

The applicants submitted that the Tribunal's determination was manifestly unreasonable or so unreasonable that no reasonable tribunal could have arrived at it, citing *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234 *(Wednesbury).* Although the English courts now use a 'proportionality review in preference to *Wednesbury* unreasonableness', the applicants relied on the latter because 'there has been no acceptance by the High Court…or the Federal Court of the English developments'—at [54].

The court found that:

- the applicants sought to rerun all the arguments addressed under the other grounds under this ground;
- it was patent from the consideration of the other grounds of appeal that there was no irrationality or illogicality in the way in which the Tribunal reached its decision;
- the case the applicants sought to rerun was fundamentally based on the assumption that the rights created must carry the day in the application of s. 237(c), a matter which was found not to be the law;
- the *Wednesbury* unreasonableness principle is confined to cases involving the exercise of a statutory discretion and, as this case did not involve the exercise of a statutory discretion, the principle was incapable of raising a question of law as required by s. 169—at [58] to [59].

Decision

The appeal was dismissed—at [61]

Party status—illegal occupier

Walker v State of Queensland [2005] FCA 1316

Allsop J, 20 September 2005

Issue

The issue considered by the court was what constitutes 'an interest' for the purposes of joinder to native title proceedings under s. 84(5) of the *Native Title Act 1993* (Cwth) (NTA).

Background

Mr Parker, who has occupied land which is a timber reserve at Whale Bone Bay south of Cooktown in Far North Queensland for 16 years, sought joinder to the proceedings of the Yalanji People's claimant application. The evidence showed that Mr Parker had applied for, and the State of Queensland had refused, a lease over the area.

His Honour Justice Allsop observed that, while Mr Parker viewed Whale Bone Bay and the structure he had built on it as his only place of residence, because he had no authority to be on the land from any relevant government department, it was unlawful for him to do so. The consequences of that were:

- he was guilty of an offence under the *Forestry Act 1959* (Qld) (Forestry Act);
- the building was unauthorised and potentially was property of the Crown under the Forestry Act; and
- under the Forestry Act, he could be removed as a trespasser—at [10] and [15].

Counsel for the claimants gave evidence that they sought recognition of non-exclusive native title rights and interests to Whale Bone Bay. Therefore, Allsop J found it difficult to see how Mr Parker's interests could be affected by the claim, especially since they were unlawful interests and that, if Mr Parker were to obtain an authority from the state, his position may be quite different—at [17].

His Honour observed that, while the notion of interest for the purposes of s. 84(5) is broad, he did not read the authorities as extending it to include a person whose occupation of the land was unlawful and who had been denied permission by the government to remain on the land. Therefore, it was difficult to see how there was any relevant interest in Mr Parker—at [18] to [20].

Mr Parker had also sought some indication of the willingness of the Yalanji People to grant him a lease should they succeed in their claim but had received no unequivocal statement about that. Allsop J found it difficult to see how it can be said that any lawful interest is affected by the possibility of non-exclusive native title rights and interests being recognised in circumstances where there was nothing that the claimants, as putative native title holders on a non-exclusive basis, could do to remedy Mr Parker's unlawful possession, either before or after the any declaration recognising that title (should that occur)—at [7] and [20].

Decision

His Honour indicated he proposed to dismiss Mr Parker's motion to join but stood the matter over for 14 days to allow the parties an opportunity to make further submissions or request a further hearing. Subject to hearing from the parties, Allsop J was not inclined to order Mr Parker to pay the costs, bearing in mind the history of the matter—at [22] and [23].

Costs of appeal proceedings in De Rose

De Rose v South Australia (No 3) [2005] FCAFC 137

per Wilcox, Sackville and Merkel JJ, 28 July 2005

Issue

This case deals with whether the parties to an appeal against a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA) should bear their own costs.

Background

In *De Rose v State of South Australia (No 1)* (2003) 133 FCR 325, the Full Court allowed an appeal against O'Loughlin J's decision in *De Rose v South Australia* [2002] FCA 1342: see *Native Title Hot Spots* Issue 8 and Issue 3 respectively. In *De Rose v South Australia (No 2)* [2005] FCAFC 110 (summarised in *Native Title Hot Spots* Issue 15), their Honours made a determination of native title in favour of the Aboriginal persons who are *Ngururitja* for the determination area according to the traditional laws and customs of the Western Desert Bloc. Their Honours also ordered that, unless the parties filed submissions within 21 days seeking a different costs order, the first and second respondents pay the appellants' costs of the appeal.

The first respondent (the state) and the second respondents (the Fullers) filed submissions that the appropriate order was that each party bear its or their costs of the appeal, referring to s. 85A(1), which provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs. The Fullers also relied on an affidavit sworn by their solicitor which established they had received public funding for the trial and the appeal but had not yet received an indemnity in respect of any costs that might be awarded against them.

The court noted (among other things) that there was no dispute that:

- section 85A of the NTA, rather than s. 43 of the *Federal Court Act 1976* (Cwlth), applied to the appeal in this case; and, therefore
- unless it was otherwise ordered, each party to the appeal must bear its or their own costs—at [6] to [7].

Their Honours Justices Wilcox, Sackville and Merkel agreed Lee J's approach to the application of s. 85A in *Ward v Western Australia* (1999) 93 FCR 305, i.e. that the starting point is that each party to a proceeding will be left to bear his or her own costs unless the court considers it appropriate in the circumstances to make a costs order. The starting point is not that costs ordinarily follow the event—at [8] to [10].

In the present case, the court did not consider the circumstances warranted a costs order in favour of the appellants because:

- the respondents (the state and the Fullers) succeeded at the trial and it was the appellants (the native title party) who appealed;
- the appeal was the first to address the complex interaction between native title and pastoral leases in South Australia;
- the case could fairly be regarded as a test case in the sense that it was likely to have ramifications for the resolution of other native title claims in South Australia;
- once the parties had the benefit of the first decision by the court, the respondents participated in mediation which narrowed the issues and resulted in the state proposing a form of native title determination that was largely adopted by the court;
- while the Fullers persisted with arguments that were ultimately unsuccessful on the appeal, their contentions were not unreasonable or clearly untenable; and

- contrary to the appellants' submissions, their Honours did not think that the appeal was unnecessarily prolonged by the conduct of the Fullers—at [12] and see 85A(2).

Decision

The earlier order was vacated. No order as to costs was made—at [13].

Right to negotiate applications

The determinations made by the National Native Title Tribunal summarised below raise interesting points or develop the law relating to right to negotiate applications made under s. 75 of the NTA, i.e. objections to the application of the expedited procedure and future act applications brought in relation to future acts to which subdivision P of Div 3, Pt 2 applies. Significant tribunal determinations are also reported in the Federal Law Report. For further information about right to negotiate proceedings, see the *Guide to future act decisions* on this web site at www.nntt.gov.au/futureact/Info.html.

Tribunal determinations on austlii and medium neutral citation

All determinations made by the Tribunal in right to negotiate applications are now published both at www.nntt.gov.au/futureact/Determinations.html and http://www.austlii.edu.au/au/cases/Cwlth/NNTTA.

Conjunctive determination and split in the applicant group

Moore;Mungeranie/Eagle Bay Resources NL/South Australia [2005] NNTTA 53

Member Sosso, 28 July 2005

Issues

This determination by the National Native Title Tribunal in a right to negotiate proceeding covers the following:

- the scope of the powers of an administrator appointed under s. 71 of the *Aboriginal Councils and Associations Act 1976* (Cwlth) to enter into agreements relating to a native title party's right to negotiate;
- whether the native title party has consented when some of the people named as 'the applicant' did not oppose the making of an agreement but refused to execute it;
- what the Tribunal should take into account when considering making a conjunctive determination pursuant to s. 26D(2) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

The South Australian Government issued a s. 29 notice of its intention to grant under the *Petroleum Act 2000* (SA) (Petroleum Act) an exploration licence (exploration licence) to Eagle Bay Resources NL (grantee party). The notice also stated that the Petroleum Act provides the holder of an exploration licence the right to apply for a petroleum production licence (production licence) where a discovery warrants production. The area covered by the proposed exploration licence overlapped the area covered by the Dieri Native Title Claim (Dieri native title party) and the Yandruwandha/Yawarrawarrka Native Title Claim (YY native title party).

The grantee party made an application under s. 35 for a future act determination under s. 38 which was proposed to include the following:

> [F]or the purpose of section 26D(2)(c) of the NTA, if a retention licence, production licence, associated facilities licence or pipeline licence is granted…under the Petroleum Act 2000 (SA), Sub-Division P of Division 3 of Part 2 of the NTA will not apply to those grants.

Issues with consent of YY native title party

The s. 35 application stated that the negotiation parties (see s. 30A) had reached agreement. However, for reasons set out below, agreement had not been finalised with the YY native title party. Therefore, a determination made by consent was sought.

Nine people were named as 'the applicant' in the relevant claimant application and, therefore, 'the registered native title claimant' and the 'native title party', i.e. nine people jointly constituted the YY native title party: see

ss. 61(1) and (2), 29(2)(b), 30(1) and the definition of 'applicant' and 'registered native title claimant' in s. 253.

The evidence before the Tribunal was that, of the nine:

- one was deceased;
- three others would not sign any documents (although the solicitor acting deposed that one would do so if paid $20,000); and
- a fourth refused to say whether or not he would sign but had earlier indicated he wouldn't sign the agreement unless he was included in a survey team in relation to another petroleum exploration agreement —at [13] to [17] and [19] to [20].

A meeting of the native title claim group had resolved to remove the deceased person and two of those who refused to sign but no application under s. 66B(1) had been made to the Federal Court to remove and replace the applicant—at [18].

A corporation known as the Yandruwandha/ Yawarrawarrka Traditional Land Owners (Aboriginal Corporation) (the corporation) represented the YY native title party in future act negotiations. It was incorporated under the *Aboriginal Councils and Associations Act 1976* (Cwlth) (ACA Act). The solicitor acting for the native title party filed affidavit evidence that the corporation was under administration.

A minute of consent determination, signed by the legal representatives for the negotiation parties, was lodged with the Tribunal. It sought to have included in the determination a statement that the right to negotiate provisions of the NTA would not apply to grants of 'any retention, production, associated facilities or pipeline licences subsequent to the grant' of the licence in question, 'subject to the Grantee Party complying with the terms of the Aboriginal Heritage Protection Protocol contained in the Schedule to this determination', i.e. a conjunctive determination as contemplated by s. 26D(2). This was the first time the Tribunal had been asked to make a conjunctive determination.

Tribunal's power to make consent determinations

It was noted that, while there is no express provision in the NTA for a s. 38 determination to be made by consent, it is open for the Tribunal to do so but the Tribunal must independently assess the material before it and determine if it would also be appropriate to do so—at [25] to [26].

Power of administrator to consent to agreements

The Tribunal:

- decided that the administrator exercised the same powers and was subject to the same limitations as the governing committee and the public officer of the corporation were prior to the appointment of the administrator;
- concluded that the administrator could give consents and agree to any course of action as could the governing committee, subject to the limitations set out in the ACA Act and in the corporation's constitution—at [8] to [17] and [40].

The role of the corporation and the administrator

A 'key' issue raised in this matter was the relationship between the corporation, the former committee, the applicant and the wide native title claim group. On the basis of the documents filed and the oral submissions received, the Tribunal was satisfied that (among other things):

- the relationship of the corporation, the former committee, the administrator and the persons comprising the applicant was 'close and symbiotic';
- there was a coordination of activities with a free, full and professional exchange of information;

- the administrator carried out his duties in a careful and reasoned manner and in no way compromised the previous decision-making process but rather bolstered it 'by providing an additional layer of supervision and assistance'—at [38] to [40].

'Consent' determination when not all who constitute the applicant agree

Three of the persons comprising the YY native title party had either refused or failed to sign the documents that would otherwise have resulted in an agreement and avoided the need for a tribunal determination. In deciding whether to make the s. 38 determination sought, the Tribunal:

- must be satisfied the agreement been reached with the full knowledge and full authority of the negotiation parties;

- will be prepared to act on the consent given by the native title party collectively unless there is some credible suggestion that it is not appropriate—at [62], referring to *Monkey Mia* at [19].

In this matter, the Tribunal was not persuaded that the three of the seven persons who refused or failed to execute the land access deed were a small minority of the wider claim group.

It was noted that:

- only the applicant has control of the litigation instituted by the filing of a claimant application and the native title claim group have no authority to take any step in the proceedings, referring to *Ankamuthi People v Queensland* (2002) 121 FCR 68 at [8] and *Combined Dulabed and Malanbarra/Yidinji Peoples v Queensland* (2004) 214 ALR 306 at [10], summarised in *Native Title Hot Spots* Issue 1 and Issue 13 respectively;

- the applicant is authorised by the claim group to advance their collective interests (i.e. as the agent of the claim group), their representative function entails the exercise of something akin to a fiduciary duty, they give voice to the aspirations of claim group members and they do not act as an independent voice disconnected from the aspirations, views and concerns of their fellow native title claimants;

- the position of an applicant does not involve a personal right and a person or persons performing this critical role should not engage in 'spoiling' tactics or in conduct that is aimed at harming the interests of the claim group and is not to act independently apart from the wishes of the native title claim group, referring to *Button v Chapman* [2003] FCA 861 at [9], summarised in *Native Title Hot Spots* Issue 7;

- relevant court cases emphasise the communal nature of native title and that individuals or sub-groups are not at liberty under the NTA to pre-empt or subvert the accepted decision-making process of a properly constituted native title claim group;

- normally, if almost half of the persons who comprised the applicant refused to execute documents, there would be an issue as to whether the claim group was divided on the merits of proceeding with an agreement;

- to contend that the Tribunal should look beyond the applicant and consider the views of the wider claim group is to ignore the clear legislative intent underlined by s. 62A—at [43] to [45] and [60].

The law on point

The main points of law were set out, including that:

- under s. 39(4), the Tribunal must take any agreement of the negotiation parties into account when making a determination but is not compelled to make a determination in accordance with the agreement but must be satisfied that it is appropriate to do so;

- the attitude of the parties is critical but the Tribunal must take into account a range of issues, not least of which is whether the agreement reached is not illegal and that

parties have entered into the agreement freely, consciously and without duress;

- the Tribunal places particular regard on whether the negotiation parties are legally represented and will ordinarily act on the consent of the negotiation parties as conveyed by their legal representatives but there are instances where further information as to consent will be required;

- if the Tribunal has material before it indicating that there is no unanimity amongst the persons comprising the applicant, it is put on notice that further inquiry is needed and the parties requesting a consent determination need to satisfy the Tribunal that such a course of action is not only legally permissible but also an appropriate exercise of the member's discretion—at [56] to [59].

Full knowledge and authority required for consent determination

The Tribunal noted that the 'key issue' in determining whether or not to make a s. 38 determination at the request of the negotiation parties (i.e. by consent) is that the agreement reached has been made with the full knowledge and full authority of the negotiation parties.

Where (as in this case) some of the persons who jointly constitute the applicant (and, in accordance with s. 253, 29 and 30, the 'registered native title claimant' and the 'native title party') decline, or fail to, sign relevant documents, the position the Tribunal adopts is that:

- a 'native title party' is not each a registered native title claimant on the same claim but is, with the others, jointly the registered native title claimant acting collectively as representatives and agents of the claim group (see s. 62A);

- each individual person constituting the registered native title claimant is not entitled to separate representation in a right to negotiate inquiry;

- the Tribunal will act on the consent given by the native title party collectively unless there is some credible suggestion that this is not appropriate;

- lawyers acting for the native title party should normally be in a position to advise the Tribunal that the consent has properly been given, based on the established decision-making processes of the native title claim group—at [62].

A useful summary of some of the 'numerous occasions' when the Tribunal has made a s. 38 determination by consent even though not all of the persons comprising the applicant had not consented is provided at [63].

Conclusion on consent issue and the s. 39 factors

In the light of these factors, the Tribunal was satisfied that:

- the YY native title party had, with full knowledge, given its consent to making of a determination along the lines submitted by the legal representatives of the negotiation parties; and

- the Tribunal was empowered to make the consent determination sought, subject to consideration of s. 26D.

The issues taken into account were (among others):

- the YY native title party was, at all times, legally represented and also had the benefit of the independent assistance of the administrator of the corporation;

- the YY native title party has previously entered into similar agreements, the proposed agreement in this case was, if anything, more favourable and the terms of the agreement are of a standard type;

- there was no material suggesting that there is any opposition based on the substance of the proposed agreement and there was sufficient material to show that the claim group as a whole supported the execution of the agreements;

- granting the proposed tenement would assist the YY native title party by developing their economic structures;
- the area of the proposed tenement had been the subject of petroleum exploration and it was not likely that the grant of the proposed tenement would effect the way of life, culture or traditions of the YY native title party or the enjoyment of their registered native title rights and interests and the material before the Tribunal did not suggest that the subject area contained any sites or areas of particular significance;
- the broader public interest in the granting of the petroleum tenement in contributing to the ongoing exploration activities essential to the health of the mining activity and the economy; and
- the specific economic significance of the doing of the future act for South Australia and the wider Australian economy—at [65].

On the last four points, see s. 39, which sets out the criteria the Tribunal must have regard to when making a s. 38 determination.

Conjunctive determination pursuant to s. 26D(2) of the NTA.

Subdivision P contains the right to negotiate provisions. There are many exceptions to or exclusions from those provisions, with s. 26D(2) being one. The relevant parts provide that subdiv P does not apply to a later act consisting of the creation of a right to mine if:

- an earlier right to mine (the earlier act) that was not invalid to any extent under s. 28 was created after s. 26D commenced in October 1998; and
- subdiv P applied to the earlier act and because of a s. 38 determination that the earlier act could be done and that that determination:
  - included a statement to the effect that, if the later act were done, subdiv P would not apply to the later act; and
  - provided that, if the later act were done, certain conditions would be complied with by parties other than native title parties (whether before or after the act was done); and
- those conditions are complied with before the later act is done.

The Tribunal noted that:

- subsection 26D(2) enabled the negotiation parties, at the exploration stage, to reach a comprehensive settlement from the exploration stage through to the mining or production stage, allowing the parties to create a legal framework for the entire process and ensuring that the right to negotiate only applied at the outset;
- from one viewpoint, this was 'a most desirable outcome' but it had proven difficult to achieve in hard rock mineral exploration projects, where it was not clear at the outset what type of mineral might be discovered and how it might be extracted—at [68].

On the latter point, the Tribunal noted that:

> There is a significant difference between hard rock exploration and mining and the exploration and production of petroleum and gas. Hard rock exploration is, almost without exception, less intrusive and less expensive to conduct than hard rock mining. The type of minerals that may be located by the exploration are sometimes not certain. More significantly, the nature of the mining operations required to extract minerals located will often be impossible to ascertain at the exploration stage. When mining commences, the actual impact on native title rights and interests will be hard to predict at the outset…particularly…if open cut mining is used…Likewise it would be highly unusual for an explorer to know, when applying for an exploration permit, whether or not minerals will be discovered, let alone the means required for extracting them, the nature of the disruption that will be caused by the grant of a right to mine and the economic benefits for the local, regional, State and national economies—at [80].

The grantee party (and the other negotiation parties by agreement) in this case sought a conjunctive determination which exempted a variety of future acts from subdiv P. Two questions arose as a result:

- whether the reference to 'later act' could apply to multiple future acts;
- the limitations, if any, on the area of land and waters in respect of which those later acts may be done as exempted acts—at [69].

The Tribunal found that:

- pursuant to s. 23 of the *Acts Interpretation Act 1901* (Cwlth), 'later act' in s. 26D(2) could be read to cover multiple future acts and applied to classes of future acts as distinct from particular future acts; and
- the later acts must be done over areas that are wholly within the area affected by the earlier act area—at [70] to [71].

The Tribunal noted that s. 26D(2) was inserted into the NTA to facilitate exploration and mining activities where one right to negotiate could be applied to the whole process and was particularly suited to petroleum and gas exploration and production as:

- the major expenditure was incurred in the exploration stage;
- the act of exploration was as disruptive as production;
- a petroleum or gas explorer knows from the outset the type of resource and the cost of extracting it;
- under the land access deeds, the negotiation parties acknowledged that the non-extinguishment principle applied to the grant of any licence or later act and to any work done pursuant to any licence or later act—at [79] to [82], referring to s. 24MD(3).

Decision

The Tribunal was satisfied that it was appropriate to make the conjunctive determination sought.

Legal capacity of applicant to consent

BHP Billiton Minerals Pty Ltd; ITOCHU Minerals & Energy of Australia Pty Ltd; Mistui Iron Ore Corporation Pty Ltd/Abdullah; Bob/Western Australia [2005] NNTTA 40

Deputy President Sumner, 7 June 2005

Issue

The main issue dealt with in this summary is whether the National Native Title Tribunal has power to make a future act determination by consent in circumstances where the sole person named as 'the applicant' in a registered claimant application (and hence, the native title party—see ss. 29, 30 and s. 253) was so infirm that his capacity to give consent was questionable.

Background

It was noted that the Tribunal is empowered to make a determination under s. 38 with the consent of the parties if it is otherwise appropriate to do so and it will normally be appropriate to do so where:

- the parties are legally represented; and
- those representatives have advised the Tribunal that there is consent.

The Tribunal's approach is to hear from the parties' representative: see *Monkey Mia Dolphin Resort Pty Ltd v Western Australia* (2001) 164 FLR 361. A solicitor employed by the Pilbara Native Title Service (the Pilbara region service arm of the representative body for the area) represented the Birrimaya native title party.

Evidence as to legal capacity

The Tribunal noted that there were 'questions' about whether the sole named applicant for the claimant application, Ginger Bob, the 'native title party' in these proceedings, had legal capacity to consent to the doing of the future act and to a determination being made under s. 38.

The evidence was that:

- the Mr Bob was elderly, in permanent care, very hard of hearing, had poor sight and, due to a stroke, could not speak clearly;
- the solicitor acting for the native title claim group had concerns about his capacity, which were put to a meeting of the Birrimaya native title claim group;
- there was a decision made at the meeting, via the group's usual decision-making process, that those named as claimants in the application should sign the Birrimaya Yarrie Continued Operations Agreement with the grantee parties and five of those nine people had done so—at [17] to [18].

Decision

The Tribunal was satisfied that, in the circumstances and despite questions about the capacity of the sole applicant to give consent, the general principles could be applied, i.e. the critical question was whether the claim group as a whole has properly decided to consent to the determination sought and the Tribunal was satisfied that, in the circumstances, it had. However, it was noted steps should be taken to replace the applicant as soon as possible—at [19].

It was noted that the Tribunal is not bound by technicalities, legal forms or rules of evidence, which meant that it:

> has some flexibility to make a determination by consent, once satisfied that the fundamental issue of whether the claim group has consented is established. If this threshold issue is resolved there is scope for the Tribunal, in accordance with the direction in s 109(3), to find an acceptable way to give effect to the decision and not create obstacles to ensuring the objects of the Act are fulfilled—at [20].

A determination under s.38 was made that the future act could be done.

Comment on role of representative body

Interestingly, in this matter the Tribunal was satisfied, on the basis of evidence of the solicitor acting for the native title party that, despite his 'infirmity':

> the Birrimaya native title party have [sic] consented to the determination with conditions in accordance with a process of the kind referred to in s 203BC(2)(b) of the Act—at [19].

Paragraph 203BC relevantly provides, in paraphrase, that in representing people who may hold native title in future act proceedings, a representative body must be satisfied those people *understand* and *consent* to any *general course of action* that the representative body takes on their behalf in relation to those proceedings. For the purposes of this provision, a person who may hold native title is taken to have consented to 'action' if the group to which that person belongs gave consent in accordance with the appropriate decision-making process (traditional or, if none, as agreed and adopted) of that group. Query whether consenting to the doing of a future act can be characterised as a general course of action.

The Tribunal also noted that the representative body had a formal role in protecting the interests of native title holders, representing claimants and being satisfied that persons they represent, including native title parties, understand and consent to a course of action, referring to ss. 203B(4), 203BB , and 203BC—at [20].

For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.
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